

DOCKET

No. 86-7113-ASX
Status: GRANTED

Title: Paula Kadrmas, et al., Appellants
v.
Dickinson Public Schools, et al.

Docketed:
June 22, 1987

Court: Supreme Court of North Dakota

Counsel for appellant: Reinhardt, Edward B.

Counsel for appellee: Dynes, George, Spaeth, Nicholas

Entry	Date	Note	Proceedings and Orders
1	Jun 22 1987	G	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
3	Jul 22 1987		Motion of appellee Dickinson Public Schools to dismiss filed.
4	Jul 22 1987		Motion of appellee North Dakota to dismiss filed.
5	Jul 23 1987		DISTRIBUTED. September 28, 1987
7	Oct 5 1987		PROBABLE JURISDICTION NOTED. *****
9	Nov 5 1987		Order extending time to file brief of appellant on the merits until December 3, 1987.
10	Nov 10 1987		Joint appendix filed.
13	Dec 2 1987		Brief amici curiae of ACLU, et al. filed.
11	Dec 3 1987		Brief of appellants Paula Kadrmas, et al. filed.
12	Dec 3 1987		Brief amici curiae of Children's Defense Fund, et al. filed.
15	Dec 7 1987		Order extending time to file brief of appellee on the merits until January 19, 1988.
16	Dec 17 1987	G	Motion of North Dakota for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Dec 18 1987		Motion of appellee Dickinson Public Schools to dismiss filed.
17	Dec 21 1987		Record filed.
		*	Certified original record, 3 volumes, received.
19	Dec 31 1987	X	Brief of appellants in response to motion to dismiss filed.
21	Jan 2 1988	D	Motion of appellees to dismiss appeal filed.
20	Jan 4 1988		DISTRIBUTED. Jan. 8, 1988. (Motion of appellees to dismiss appeal).
22	Jan 11 1988		Motion of North Dakota for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Jan 11 1988		Motion of appellees to dismiss appeal DENIED.
24	Jan 19 1988		Brief amicus curiae of North Dakota filed.
25	Jan 19 1988		Brief of appellee Dickinson Public Schools filed.
26	Jan 19 1988		Brief amicus curiae of United States filed.
27	Feb 5 1988		SET FOR ARGUMENT. Wednesday, March 30, 1988. (2nd case).
28	Feb 10 1988		CIRCULATED.
29	Feb 24 1988	X	Reply brief of appellant Paul Kadrmas filed.
30	Mar 30 1988		ARGUED.

JURISDICTIONAL STATEMENT

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOLO, JR.
CLERK

No. 86-7113

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor by her next
friend, Paula Kadrmas, Appellants,

v.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his
capacity as Superintendent of the Dickinson Public Schools;
CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD KRIEG,
HERB HERAUF, in their capacity as members of the Dickinson School
Board; RICHARD RYKOWSKY, in his capacity as Transportation
Supervisor of the Dickinson Public Schools, Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

EDWARD B. REINHARDT, JR.
North Dakota Legal Services, Inc.
P.O. Box 217
New Town, North Dakota 58763
(701) 627-4719
Counsel of Record

DUANE HOUDEK
Legal Assistance of North Dakota
P.O. Box 1893
Bismarck, North Dakota 58502-1893
(701) 222-2110
Counsel for Appellants

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

June 12, 1987

QUESTIONS PRESENTED

North Dakota contains two types of school districts: reorganized and non-reorganized. Reorganized districts are required by statute to provide transportation to all students. Non-reorganized districts are not required to provide transportation, but if they do, they are authorized by statute to charge fees for such transportation.

The Dickinson, North Dakota school district is a non-reorganized district. It has adopted a busing policy which requires rural students to pay a fee to be bused to and from elementary and high school. The amount of the fee is based on the number of children being bused in a family. No consideration is given to the family's ability to pay, and no waiver or reduction of the fee has ever been made.

The questions presented are:

1. Whether the Dickinson busing policy violates the equal protection clause of the Fourteenth Amendment by denying equal educational opportunity to children whose parents have income and resources at or near the poverty level.
2. Whether the differentiation between reorganized and non-reorganized school districts in regard to transportation violates the equal protection clause of the Fourteenth Amendment.
3. Whether the Dickinson busing policy and the statutes affecting busing are to be reviewed under the "intermediate" level of equal protection analysis, as affecting a substantial federal right.

PARTIES

Appellant Sarita Kadrmas was known as Sarita Colton in the action below; since this action was initiated, she has been adopted by her stepfather, and her name was changed to "Kadrmas".

Marsha Hall, Yvonne Hall, and Howard Hall were plaintiffs in the action below who have not joined in this appeal.

Wayne Sanstead, North Dakota Superintendent of Public Instruction, was sued in his official capacity at the trial level, but was dismissed as a defendant by the trial court.

NOTICE TO THE NORTH DAKOTA ATTORNEY GENERAL

Pursuant to Rule 28.4(c), Rules of the Supreme Court of the United States, you are hereby notified that this is a proceeding wherein the constitutionality of a statute of North Dakota is drawn into question and that 28 U.S.C. Section 2403(b) may be applicable.

TABLE OF CONTENTS

Opinions Below. 1
Jurisdiction. 1
Constitutional Provisions, Statutes and Policies. 2
How the Federal Questions Were Raised 3
Statement of the Case 5
The Question is Substantial 6
Conclusion. 17
Appendix. A-1
 Opinion of the North Dakota Supreme Court. A-1
 Memorandum Decision, Stark County District Court A-10
 Findings of Fact, Conclusions of Law and Order
 for Judgment A-17
 Notice of Entry of Judgment. A-24
 Judgment A-26
 Notice of Appeal A-29
 Amended Complaint. A-30
 N.D.C.C. 15-27.3-10. A-43
 N.D.C.C. 15-34.2-01. A-45

TABLE OF AUTHORITIES

Cases

Brown v. Board of Education of Topeka,
347 U.S. 483 (1954) 7, 10
Cleburne v. Cleburne Living Center, 473 U.S. _____.
105 S.Ct. 3249 (1985) 14
Craig v. Boren, 429 U.S. 190 (1976) 14
Dandridge v. Williams, 397 U.S. 471 (1970) 14, 15
Graham v. Richardson, 403 U.S. 365 (1971) 11
Maryland v. Baltimore Radio Show, 336 U.S. 912 (1950) 7

<u>Matthews v. Lucas</u> , 427 U.S. 495 (1976).	14
<u>Mississippi University for Women v. Hogan</u> , 458 U.S. 718 (1982).	7
<u>Plyler v. Doe</u> , 457 U.S. 202 (1982)	7, 8, 9, 10, 12, 13, 14, 15, 16, 17
<u>San Antonio Independent School District v. Rodriguez</u> , 411 U.S. 1 (1973).	7, 8, 9, 10, 15, 16
<u>Shaffer v. Board of School Directors of the Albert Gallatin Area School District</u> , 687 F.2d 718 (3rd Cir. 1982), cert. denied 459 U.S. 1212 (1982).	7
<u>Shapiro v. Thompson</u> , 394 U.S. 618 (1969).	13
<u>Statutes</u>	
North Dakota Century Code: 15-34.2-06.1.	3, 4, 10, 11
15-27.1-10.	11
15-34.2-01.	11

No. _____
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor by her next
friend, Paula Kadrmes, Appellants,

v.

DICKINSON PUBLIC SCHOOLS; BOSS JULSON, in his
capacity as Superintendent of the Dickinson Public Schools;
CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD FRISQ,
HERB HERAUF, in their capacity as members of the Dickinson School
Board; RICHARD RYKOWSKY, in his capacity as Transportation
Supervisor of the Dickinson Public Schools, Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

Paula Kadrmes and Sarita Kadrmes, the appellants, appeal
from the Judgment of the Supreme Court of North Dakota, dated
March 26, 1987, holding that North Dakota Century Code Section
15-34.2-06.1 and the busing policy of the Dickinson Public
Schools are not unconstitutional as being in violation of
appellant's right to equal protection guaranteed by the
Fourteenth Amendment to the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota, which
appears in the appendix hereto, p. A-1, *infra* is reported at 402
N.W.2d 897 (ND 1987).

The Memorandum Decision of the Stark County District Court,
dated April 11, 1986 is not reported. It is reprinted in the
appendix hereto, p. A-10, *infra*.

JURISDICTION

The Judgment of the Supreme Court of North Dakota, upholding

the constitutionality of NDCC 15-34.2-06.1 and the busing policy of the Dickinson Public Schools, and dismissing appellants' Complaint, was entered on March 26, 1987.

A notice of appeal to this Court was timely filed in the Supreme Court of North Dakota on June 19, 1987.

This appeal is being docketed in this Court within 90 days from the entry of judgment below. The jurisdiction of this Court is being invoked under 28 USC Section 1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES.

Fourteenth Amendment, United States Constitution:

No state shall deny to any person within its jurisdiction the equal protection of the laws.

Section 15-34.2-06.1, North Dakota Century Code (1985 Supp.1):

15-34.21-06.1. Charge for bus transportation optional. The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. For schoolbus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the state average costs for transportation or the local school district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceding school year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

Busing Policy Of The Dickinson Public Schools

I. Busing Limits

Transportation on school district rural buses or family transportation payments will be offered to all students who live outside the school bus mileage limits.

The mileage limits are as follows:

Elementary and Junior High Students - 3 miles from their assigned schools.

High School Students - 4 miles from the school.

When there is room available on rural buses, students living inside the mileage limits will be offered transportation on the basis of the furthest out first.

III. School Bus Fees

The school bus fees were established on the recommendation of a special busing committee to help cover the cost of the total

busing program. All persons riding on the school district buses must pay the fees.

The busing fee must be paid in advance for the entire school year or arrangements for payment made with the transportation supervisor before the buses will transport the patron's children to and from school. Fees will be due and payable at the time of registration. The busing fees will be paid at the school where the child is registered. However, if a family has children to register at more than one school, the fee may be paid for all their children at one school. Parochial school children's fees are to be paid at the Dickinson Public Schools Administration Office located at 202 East Villard.

No bus fee will be charged for any special education or handicapped student, as specified in the Special Education Busing Policy.

A BUSING AGREEMENT MUST BE SIGNED BY ALL BUSING PATRONS PRIOR TO THE BUSING OF SCHOOL CHILD/CHILDREN.

BUSING FEE SCHEDULE

One child.....	\$ 97.00
Two children.....	\$190.00
Three children.....	\$285.00
Four children.....	\$360.00
Five or more children.....	\$315.00
(Amount indicated is for the entire year.)	

Refunds on busing fees will be made on a prorated monthly basis to any bus patron moving out of the busing area. Patrons moving into the busing area will pay on a prorated monthly basis. Anyone living in the district and planning on moving into the busing area should notify the Administration Office as soon as possible.

HOW THE FEDERAL QUESTIONS WERE RAISED

The appellants filed a complaint (later amended) in the Stark County District Court requesting declaratory and injunctive relief. A copy of the amended complaint appears in the appendix hereto, p. A-30, infra. The appellants alleged, in part, that "...the busing policy of the Dickinson Public Schools violates the 14th Amendment to the United States Constitution." App. at p. A-39, A-40. The amended complaint also asserted that "[b]y enforcing the busing policy without provision for a waiver or a graduated fee scale, the Dickinson Public Schools does not apply 15-34.2-06.1, NDCC with equal effects upon the Plaintiffs...", and asked the court to issue an order "...declaring Section 15-34.2-06.1, NDCC in violation of the 14th Amendment to the

United States Constitution." App. at p. A-39, A-40. At trial, the appellants also raised the issue of whether the distinction between reorganized and non-reorganized districts is constitutional. After a trial, the district court dismissed the complaint in a judgment dated May 6, 1986.

The appellants renewed their Fourteenth Amendment claims before the North Dakota Supreme Court. The North Dakota court found "[t]he plaintiffs...assert an appeal that the school bus charges authorized under Section 15-34.2-06.1, NDCC, violate their rights to equal protection under the Fourteenth Amendment to the United States Constitution..." See opinion below, p. A-6, *infra*. Two aspects of equal protection were asserted. "First, [the appellants] assert that the transportation charges create a wealth classification which discriminates against poor persons. Second, they assert that the statute, by authorizing only school districts which have not been reorganized to charge a school bus service fee, creates a classification between reorganized and nonreorganized districts which discriminates against persons residing in the nonreorganized districts." *Id.*

The appellants asserted that the "intermediate" standard of review was applicable to the statute. The court found that the schoolbus fees were "purely economic legislation" and that "...the rational basis test is the appropriate standard of review for [the appellants] equal protection claims in this case." *Id.*

The court went on to hold that "...the statute does not discriminate on the basis of wealth so as to violate federal...equal protection rights." See opinion below, p. A-7, *infra*. The court also held that "...Section 15-34.2-06.1 does not violate the federal...equal protection rights of persons residing in nonreorganized districts." *Id.* The North Dakota Supreme Court thus considered and expressly rejected the appellants' federal constitutional claims.

STATEMENT OF THE CASE

Paula Kadrmas and Sarita Kadrmas, the appellants, live near the town of New Hradec, North Dakota, within the boundaries of the Dickinson Public Schools (hereinafter "school district"). They have lived there at all material times. Paula is Sarita's mother; when this action was begun in 1985, Sarita was in the fourth grade and attended Roosevelt Elementary School in Dickinson, located about 16 miles from New Hradec.

The school district operates a school bus system for children who live more than three miles from elementary schools and more than four miles from high schools. Before a child may ride the bus, his or her parents must sign a contract and agree to pay a yearly fee for busing service. The fee is \$97.00 per year for one child. A family's income is not considered in imposing the fee, and the school district does not and has never allowed the fee to be waived.

The Kadrmas family consists of the appellants, Paula and Sarita, Paula's husband and two preschool children. Mr. Kadrmas was employed on a temporary basis in the oil fields at the time of this action. The trial court found that the Kadrmas family has a gross income at or near the federal poverty level.

Paula Kadrmas and a neighbor, Marsha Hall, refused to pay the busing fee for the 1985-86 school year, and their children were denied bus service by the school district. (Marsha Hall is a single mother of two children; she was a plaintiff in the action below, but has not joined in this appeal). The denial of busing service forced Ms. Kadrmas and Ms. Hall to find other means of transporting their children to school.

Ms. Kadrmas and Marsha Hall transported their children to school by means of car-pooling. Marsha Hall would generally take the children to school in the mornings and Ms. Kadrmas would pick them up in the afternoons. The Kadrmas family only has one

vehicle, which was also needed to transport Mr. Kadrmas to a pick-up point where he would be driven to his job site. Mr. Kadrmas worked different shifts, which required Ms. Kadrmas to make separate trips for him, in addition to school transport. The trial court found the cost of self-transportation greatly exceeded the fees charged by the district. Ms. Hall worked in Dickinson at nights, but because her work schedule did not coincide with school, the transportation trips were in addition to her normal commute. Neither Kadrmas nor Hall would have made more than one or two extra trips to Dickinson per week, except for transporting their children.

The school district spends \$312,147 annually for busing students to school. (This does not include busing athletes to athletic events. That costs the district approximately \$18,000 annually, and no fee is charged to the athletes.) Approximately \$244,000 of the transportation budget is paid by the state in the form of transportation aid payments to the district, and roughly \$34,000 comes from the district general fund, raised through property taxes. The remaining \$34,000 in the busing budget is generated by the busing fee.

Ms. Kadrmas and Ms. Hall filed suit, asking that the statute allowing fees to be charged and the school district's busing policy be declared in violation of the Fourteenth Amendment. The trial court dismissed the complaint, which was affirmed by the Supreme Court of North Dakota.

THE QUESTION IS SUBSTANTIAL

The impact of the Fourteenth Amendment's equal protection clause upon non-waivable school transportation fees, particularly as applied to poor persons is a novel and substantial question. It has never been treated before by this Court.

In several instances, this Court has dealt with the issue of whether particular state actions constitute denial of opportunity

for education. In Brown v. Board of Education of Topeka, 347 U.S. 483, (1954) the Court found that racial segregation of schools is a denial of equal opportunity for education. Segregation based on gender was similarly found to be a denial of equal opportunity in Mississippi University for Women v. Hogan, 458 U.S. 718, 731 (1982). A school funding scheme that allowed some school districts to have a higher funding level than others was considered in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) and held not to deny equal educational opportunity. Requiring illegal aliens to pay tuition before their children could attend public schools was a denial of equal opportunity in Plyler v. Doe, 457 U.S. 202 (1982). The Court has generally not favored actions which inhibit access to education.

The Court has not dealt directly with the effect of equal protection on transportation and access to education. The closest fact pattern to date was in Shaffer v. Board of School Directors of the Albert Gallatin Areas School District, 687 F.2d 718 (3rd Cir. 1982), cert. denied 459 U.S. 1212 (1982) in which the Court refused to consider a challenge to a school district policy allowing only one way transportation for kindergarten students.

Denial of certiorari, however, has no precedential value, and does not imply approval or disapproval of the lower court's decision. Maryland v. Baltimore Radio Show, 338 US 912 (1950). Although Shaffer involved bus transportation, no equal protection issues were resolved by this Court.

This case properly brings before the Court the issue of whether Fourteenth Amendment equal protection insures equality in access to education. The busing policy of the Dickinson Public Schools affects rural children in all grades for their entire school careers. Parents whose income is at the poverty level

must pay for transportation for their children for at least 12 years (either in the form of busing fees or by transporting their children themselves) in addition to the other expenses of child raising. Those least able to afford it are required to shoulder a heavier burden for the sake of their children's education. Such an inequity reveals the need for the Court to consider whether the Fourteenth Amendment's equal protection guarantee allows the school district to charge fees for school transportation.

Both the school board of the Dickinson Public Schools and the North Dakota Supreme Court have a duty to ensure that all children have adequate access to education under the equal protection clause of the Fourteenth Amendment. Both have failed to perform that duty. When a local school board and the court of last resort will not correctly apply equal protection principles, this Court must do so.

1. The Dickinson Busing Policy Violates the Equal Protection Clause of the Fourteenth Amendment by Denying Equal Educational Opportunity to Children Whose Parents Have Income And Resources At or Near the Poverty Level. This case presents the question of whether a state may deny equal access to education to a distinct class of people: minor children whose parents are at or below the national poverty level and, thus, unable to pay the fee required of them.

This Court has recognized that, despite the fact that education is not a fundamental right under the constitution, and wealth not a suspect classification, "an absolute denial of educational opportunities to any of its children", which a state undertakes to provide for others, violates the spirit of equal protection and is unconstitutional. Plyler v. Doe, supra. See also San Antonio Independent School District v. Rodriguez, supra. To be sure, the application of Plyler to this case is not made

without question.

There is first a question of whether denying equal access to a system of transportation is a denial of educational opportunity. In a northern, rural state such as North Dakota, where the weather is often harsh, and the nearest school within a district may be twenty-five or more miles away, it is submitted that the rural school bus is, in fact, access to education. Especially for the poor. As noted in the dissent below: "In a rural state like ours, it is clear that transportation is extremely important to education. Without transportation some children would be literally cut off from education". See opinion below, p. A-8, A-9, infra. (Levine, J. dissenting.)

North Dakota spends 23 million dollars per year providing transportation to elementary and high school students, or about 7% of its total education budget for those grades. The Dickinson school district spends 3% of its budget on transportation. The state provides free transportation, and has done so since 1911, in 263 of the state's 311 school districts. These facts illustrate the importance accorded transportation in the educational system, and underscores the integral nature of transportation in North Dakota's system of large districts and centralized schools. Thus, there is a substantial question of whether education is denied the children in this case, who live 16 miles from school, and whose parents cannot afford to pay a busing fee.

There is a second question raised by the record in this case: Inasmuch as these children did not actually miss school because of the imposition of a busing fee, can it be said there is actual deprivation of education, of the kind described in San Antonio and found illegal in Plyler?

It is submitted that actual deprivation is not required. In fact, it would be the ultimate irony if these children were

denied relief because their parents recognized, as this Court has, that "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," Brown v. Board of Education, supra, at 493, and have made sure their children got to school, through any sacrifice, and at the cost of other necessities of life.

This is not a case, such as San Antonio, where the difference is in the quality of education afforded classes of children, with a minimum given to all; rather, the case is like Plyler, where the inability to pay a fee will result in denial of the education process itself. Again, substantial questions under the Constitution are raised.

Finally, it must be recognized that under any heightened standard of review, the state of North Dakota, through the Dickinson School District, has failed to offer any reason that would justify the denial of free school transportation to those at the poverty level. The only justification found by the North Dakota Supreme Court was that the busing fees authorized by Section 15-34.2-06.1 are rationally related to the legitimate governmental objective of allocating scarce resources. The court could find nothing further, for nothing further was offered by the school district.

The only reason for the fee system is a preservation of finances. And yet the record is clear that the \$34,000.00 received in busing fees could be made up without further revenue measures being enacted, and without a cut in services. In fact, the record showed that during the same time that busing fees were being collected for carrying children to and from school, the school district was providing free transportation for student-athletes to competitions at a cost to the district of \$18,000.00.

Concern for the preservation of financial resources standing alone can hardly justify the classification used in allocating those resources. Graham v. Richardson, 403 U.S. 365 (1971).

Here, there is presented a real question of whether North Dakota may deny access to education to some, or at least make education less accessible, solely on the claimed need to preserve the school district's fisc.

2. The Differentiation Between Reorganized and Non-reorganized School Districts in Regard to Transportation Violates the Equal Protection Clause of the Fourteenth Amendment.

North Dakota statutes provide for the existence of two types of school districts which differ substantially in regard to transportation. Reorganized school districts are required by Section 15-27.3-10, N.D.C.C. (1985 Supp.) to provide either schoolbus transportation for all children, at no cost to the family, or to provide payments to families in place of transportation. (Section 15-27.3-10 is reproduced in the appendix hereto, p. A-45, infra.) School districts which have not reorganized are not required to provide transportation. Non-reorganized school districts may provide transportation pursuant to Section 15-34.2-01, N.D.C.C. (reproduced at p. A-45, infra), but whether to provide transportation in the first instance is at the option of the district. If a district does provide transportation, it may charge a fee for such transportation pursuant to N.D.C.C. 15-34.2-06.1. Thus, two separate types of districts are created. One group of districts must provide access to education, while the other group does not have to provide access, and is allowed to charge a fee if it does provide access.

The majority of school districts in the state have reorganized. Out of a total of 311 districts, 263 have reorganized and are required to provide transportation. Those

parents who live in the 48 non-reorganized districts are required to incur an expense (transportation) not shared by parents in the majority of school districts.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike'" (citation omitted). Plyler v. Doe, 457 U.S. at 216. Moreover, "[t]he Constitution does not require things which are different in fact...to be treated in law as though they were the same" (citation omitted). Id. Whether the difference between transportation in reorganized and non-reorganized districts is a violation of equal protection depends on how the residents of each type of district are treated.

Residents of non-reorganized districts, particularly those at or near the poverty level, such as the appellants, are not treated the same as residents of reorganized districts. Low income parents who live in a reorganized district who live 16 miles from school will have their children transported to school at no cost to themselves. They are able to use their limited income and resources to pay for the necessities of life. Low income residents of non-reorganized districts who live 16 miles from school must either transport their children themselves, or pay a fee to the school district for busing service, if such service is provided. Either way, the parent in a non-reorganized district must take money out of his or her pocket to pay for transportation. Transportation money is money that cannot be spent on other necessities. A low income parent in a reorganized district has money available for child-raising that a parent in a non-reorganized district must spend on transportation. Similarly circumstanced people are not being treated alike.

The North Dakota Supreme Court failed to recognize that similarly circumstanced people are not being treated alike. The court did recognize that there is a difference in the

transportation schemes allowed in reorganized and nonreorganized districts. However, the Court sought to justify the difference on the basis of economics. The "obvious purpose" was to encourage school district reorganization, which would increase the tax base (presumably increasing the district's operating funds), and that free busing was intended to "alleviat[e] parental concerns regarding the cost of student transportation in the reorganized district." See opinion below, p. A-7, infra. The court relied on financial arguments to treat things which are different in fact as if they were the same in law.

A state "may legitimately attempt to limit its expenditures...for...public education", but "[i]t could not, for example, reduce expenditures for education by barring indigent children from its schools." Shapiro v. Thompson, 394 U.S. 618, 633 (1969). Moreover, "[t]he state must do more than justify its classification with a concise expression of an intention to discriminate", (citation omitted), Plyler v. Doe, 457 U.S. at 227.

The distinction created between reorganized and non-reorganized districts is exactly that which is prohibited by the equal protection clause. Indigent children are being barred from school in the name of economics. Economics in this instance is nothing more than a concise expression of intent to discriminate. More than that is needed to justify the distinction between transportation in reorganized and non-reorganized school districts. Nothing more has been offered, and nothing more can be offered. Consequently, the difference in transportation schemes between reorganized and non-reorganized school districts cannot be upheld under the equal protection clause of the Fourteenth Amendment and must be struck down.

3. The Dickinson Busing Policy and the Statutes Affecting Busing Are to be Reviewed Under the "Intermediate" Level of Equal

Protection Analysis as Affecting a Substantial Federal Right.

In applying equal protection analysis the Court has used three standards of review. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest" Cleburne v. Cleburne Living Center, 473 U.S._____, 105 S. Ct. 3249 (1985) (citations omitted). This is the test applied to matters involving economics and social welfare legislation. Dandridge v. Williams, 397 US 471, 485 (1970). A statute is subject to strict scrutiny when it makes classifications based on "race, alienage or national origin", Cleburne, *supra*, 473 U.S. at _____, 105 S. Ct. 3249, or when it impinges upon "the exercise of a 'fundamental right'" Plyler v. Doe, 457 U.S. at 217. (1982). Under strict scrutiny, a state must show that the challenged classification is necessary to serve a compelling state interest. *Id.*, 457 U.S. at 217. The third standard has been generally referred to as a "heightened standard of review". Cleburne, *supra*, 473 U.S. at _____, 105 S. Ct. 3249. Under the heightened standard of review, the Court determines whether the classification at issue "reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." Plyler v. Doe, 457 U.S. at 217, 218. This heightened or intermediate scrutiny is used "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases...to aid us in determining the rationality of the legislative choice." *Id.*, 457 U.S. at 218, n.16. The intermediate standard of review has been applied in cases involving gender-based classifications, Craig v. Boren, 429 U.S. 190, 197 (1976), illegitimacy, Matthews v. Lucas, 427 U.S. 495, 506 (1976), and education. Plyler v. Doe, 457 U.S. at 224. The nature of the classification created or

the right affected essentially determines the standard of review. The standard of review to be applied in the present case depends on the status of education.

Education occupies a position in between fundamental rights on the one hand, and economic and social welfare legislation on the other. Education is not a fundamental right, San Antonio Independent School District v. Rodriguez, *supra*, at 35, so strict scrutiny is not the applicable standard of review. If education were classified as social welfare legislation, the rational basis test of Dandridge v. Williams, *supra*, would be applicable. "But neither is [education] some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Plyler v. Doe, 457 U.S. at 221. Education has a higher status than economic and social welfare legislation, and consequently is subject to a higher standard of review.

The higher standard of review is the "intermediate" standard applied in Plyler. The situation in Plyler is analogous to that of the present case. The persons affected are children. In the present case, the children are those at or below the federal poverty level. Poverty is not a suspect classification, Dandridge v. Williams, *supra*, nor is education a fundamental right. San Antonio Independent School District v. Rodriguez, *supra*. However, the net effect of the challenged statute and the school district's policy is to impose a hardship (lack of access to education) on a group of children (rural and poor) who are not responsible for their status. Intermediate scrutiny is applicable to this case because education is one of the "concerns sufficiently absolute and enduring" which has been "clearly ascertained from...our cases." Plyler, *supra*.

The appellants make no claim that the education provided by the Dickinson Public Schools is inadequate when compared with other school districts in North Dakota. If they were making such

a claim, the issue would be the same as in San Antonio Independent School District v. Rodriguez, supra. However, the appellants have no dispute with the quality of education in the Dickinson Public Schools. The issue, therefore, is not the same as in San Antonio.

The issue in the present case is whether a barrier to education may be placed in the way of those least able to overcome it. The barrier is the fee charged for busing. The situation is very similar to Plyler v. Doe, supra. In Plyler, the barrier imposed by the school district was the tuition payments required of children of illegal aliens. The present case and Plyler both deal with denial of access to education. The issue is the same; consequently, the standard of review is the same.

When the North Dakota Supreme Court analyzed the federal equal protection claims in the present case, it used the wrong standard of review. The majority recognized that "[n]o one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein." See opinion below, p. A-3, infra. The Court went on to conclude that "the challenged statute is purely economic legislation". Id., p. A-6. The rational basis test was then used to uphold the challenged statute.

Recognizing that a child who cannot get to school cannot learn, and yet asserting that fees which hinder access to education are simply economic legislation is illogical at best. The dissent had the more realistic view that "without access to education, the right to education is meaningless." See opinion below, p. A-8, infra, (Levine, J. Dissenting). In Plyler v. Doe, supra the Court was faced with a denial of access to education in the form of tuition payments. Using the logic of the North


Dakota court, tuition payments would simply be economic legislation because they did not actually prevent children of illegal aliens from attending school. The North Dakota court has severed education from access to education. This Court recognized in Plyler that education itself and access to education are inextricably intertwined.


The North Dakota Supreme Court incorrectly applied the rational basis standard of review. Under Plyler, the intermediate standard of review should have been used. Under that standard, the statute and policy of the school district will only withstand constitutional scrutiny if they further a "substantial goal" of the state. Under the intermediate standard, the challenged statute and school district policy cannot be shown to further any substantial goals of the state.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,


EDWARD B. REINHARDT, JR.
North Dakota Legal Services, Inc.
P.O. Box 217
New Town, North Dakota 58763
(701) 627-4719
Counsel of Record


DUANE HOUSER
Legal Assistance of North Dakota
P.O. Box 1893
Bismarck, North Dakota 58502-1893
(701) 222-2110

Counsel for Appellants

APPENDIX

judgment, and, at the time of Dorothy's death, John was her spouse under that law. However, because the interlocutory divorce judgment dealt with the couple's property, it was contractual in nature and became a conclusive adjudication of the couple's property rights. The dispositive issue is not John's status as Dorothy's spouse, but his right to Dorothy's property which was determined by the interlocutory divorce judgment and was conclusive and res judicata with respect to that issue. *Estate of Williams*, 36 Cal 2d 289, 223 P.2d 245 (1950). Thus, the principles of res judicata preclude John from seeking a redetermination of property rights adjudicated in the interlocutory divorce judgment which became final when no appeal was taken and no action was taken to attack the interlocutory divorce judgment under Cal. Code of Civ. Proc. § 473.

Moreover, we do not believe that Susan is precluded from inheriting the entire North Dakota estate because of her failure to contest the probate of Dorothy's California estate or her acknowledgement in that action that John was Dorothy's surviving spouse. For whatever reason Susan may not have wanted to contest the probate of Dorothy's California estate. Additionally, John testified that the actual terms of the interlocutory divorce judgment were not brought to the attention of Susan or the California probate court. Under these circumstances we conclude that Susan is not barred by the doctrines of res judicata or collateral estoppel from inheriting Dorothy's entire North Dakota estate.

The judgment is affirmed.

GIERKE, VANDE WALLE, LEVINE
and MESCHKE, JJ., concur.



est depends when it is not disposed of by will, are regulated by the laws of this state without regard to the residence of the decedent. Except when special provision is made otherwise by law, the validity and effect of a testamentary disposition of any other prop-

Paula KADRMAS; Marsha Hall; Sanna Coltan, a minor, by her next friend, Paula Kadrmas; Yvonne Hall, a minor, by her next friend, Marsha Hall; Howard Hall, a minor, by his next friend, Marsha Hall, Plaintiffs and Appellants.

v.

DICKINSON PUBLIC SCHOOLS; Ross Johnson, in his capacity as Superintendent of the Dickinson Public Schools; Clarence Storvick, Nancy Johnson, Merry Johnston, Harold Krieg, Herb Hensel, in their capacity as members of the Dickinson School Board; Richard Rykowski, in his capacity as Transportation Supervisor of the Dickinson Public Schools, Defendants and Appellees.

Cir. No. 11262.

Supreme Court of North Dakota.

March 26, 1987.

Parents brought action to enjoin collection by school district of any fee for school bus transportation. The Southwest Judicial District Court, Stark County, Donald L. Jorgensen, J., dismissed the action. The parents appealed. The Supreme Court, Erickstad, C.J., held that: (1) statute authorizing school bus fees does not violate constitutional article mandating uniform system of free public schools, and (2) statute does not violate equal protection.

Affirmed.

Levine, J., filed a concurring and dissenting opinion.

1. Schools 6-189(1)

Constitutional article mandating uniform system of free public schools does not

is situated within the state, and the ownership and disposition of such property when it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death."

require the state or school districts to provide free transportation for students to and from school. Const. Art. 8, § 2.

2. Schools ¶10

Statute which authorizes charges for school bus service does not violate constitutional article mandating uniform system of free public schools. NDCC 15-34.2-06.1; Const. Art. 8, § 2.

3. Constitutional Law ¶242.2(6)

Statute authorizing charges for school bus service was purely economic legislation which neither involved suspect classification nor fundamental nor important substantive right which would have required strict scrutiny or intermediate standard of review; therefore, rational basis test was appropriate standard of review for equal protection challenge to statute. NDCC 15-34.2-06.1.

4. Constitutional Law ¶242.2(6)

Schools ¶10

School bus charges authorized by statute were rationally related to legitimate governmental objective of allocating limited resources and did not discriminate on the basis of wealth so as to violate equal protection. NDCC 15-34.2-06.1; U.S.C.A. Const. Amend. 14.

5. Constitutional Law ¶242.2(6)

Schools ¶10

To the extent statutes authorizing school bus fees only allow reorganized school districts to charge the fees, statute constitutes legislation which is rationally related to legitimate governmental purpose of encouraging school district reorganization with concomitant tax base expansion and enhanced and more effective school system and does not violate equal protection rights of persons residing in nonreorganized districts. NDCC 15-34.2-06.1; U.S.C.A. Const. Amend. 14.

North Dakota Legal Services, Inc., New Town, and Legal Assistance of North Dakota, Inc., Bismarck, for plaintiffs and appellants; argued by Duane Houdek. Appearance by Edward B. Reinhardt, Jr.

Freed, Dynes, Reichert & Buresh, Dickinson, for defendants and appellees; argued by George T. Dynes.

ERICKSTAD, Chief Justice.

This is an appeal from a district court judgment upholding, against constitutional attack, schoolbus fees charged by the Dickinson Public Schools (the School District). We affirm.

The School District offers schoolbus transportation to and from school for elementary level students residing more than three miles from the school and for high school students residing more than four miles from the school. For students to receive such transportation their parents must sign a contract agreeing to pay a fee to defray part of the cost. Plaintiffs Paula Kadmas and Marsha Hall have children attending elementary school in Dickinson, and both families reside approximately sixteen miles from the school. Paula and Marsha refused to sign the School District's contract for schoolbus service for the 1985-86 school year; instead, they transported their children to and from school at costs to them which, the trial court found, "greatly exceed the bus fees charged by the Dickinson District."

During the period relevant to this case approximately 13 percent of the students were receiving schoolbus transportation. The fee charged by the School District for this service was \$97.00 per school year for one student and \$150.00 per school year for two students. This fee generated approximately 11 percent of the School District's total cost for providing the service. Approximately 89 percent of the total cost was provided to the School District from state and local tax revenues.

The plaintiffs filed this action against the School District seeking to enjoin collection of any fee for schoolbus transportation. The district court entered a judgment dismissing the action on its merits, and from that judgment the plaintiffs have filed this appeal.

KADRMAS v. DICKINSON PUBLIC SCHOOLS N.D. 899

Cite as 402 N.W.2d 897 (N.D. 1987)

Section 15-34.2-06.1, N.D.C.C., provides a limited authorization for school districts to charge for schoolbus service:

"The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. . . . For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceding school year. . . ."

The plaintiffs assert that the foregoing statute unconstitutionally authorizes fee charges for schoolbus services in violation of the mandate within Art. VIII, § 2, N.D. Const., for a uniform system of free public schools:

"Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education."

In *Cardiff v. Bismarck Public School District*, 263 N.W.2d 105 (N.D. 1978), this court analyzed the language of Art. VIII, § 2, N.D. Const., in holding that school districts are required to provide elementary school textbooks without charge:

"We must assume that the framers of the constitution made a deliberate choice of words which reflected or expressed their thoughts. The term 'free public schools' without any other modification must necessarily mean and include those items which are essential to education. . . ."

"The word 'free' takes on its true and full meaning from the context in which it is used. There can be no doubt that the term means 'without charge or cost.' In the absence of any other showing we must conclude that the term was com-

monly understood by the people to mean 'without charge or cost.' Books and school supplies are a part of the education system. This is true whether we apply the necessary elements of the school's activities test or the integral part of the educational system test." 263 N.W.2d at 113.

The plaintiffs in this case urge us to construe Art. VIII, § 2, N.D. Const., to require that school districts provide transportation for students to and from school without any fee or charge to the parents for such service.

In construing a constitutional provision we must undertake to ascribe to the words used that meaning which the people understood them to have when the constitutional provision was adopted. *State ex rel. Sonstead v. Freed*, 251 N.W.2d 898 (N.D. 1977). In so doing, it is appropriate to consider contemporaneous and long-standing practical interpretations of the provision by the Legislature where there has been acquiescence by the people in such interpretations. *Sonstead, supra*; *State ex rel. Linde v. Robinson*, 35 N.D. 417, 421-422, 160 N.W. 514, 516-517 (1916). Section 148, of our original constitution adopted in 1889, the predecessor to Art. VIII, § 2, N.D. Const., contained identical language mandating "a uniform system of free public schools." At that time there was no statutory provision requiring or authorizing school districts to provide student transportation or to compensate parents for transporting their children to and from school. Our statutory law remained silent with regard to school districts providing transportation or reimbursement for transporting students until 1903, when a law was enacted authorizing school boards to arrange and pay for student transportation under specified circumstances or when "petitioned by a majority of the district voters." 1903 N.D. Sess. Laws, Ch. 83, §§ 3, 4. Section 15-34.2-06.1, N.D.C.C., specifically authorizing a limited schoolbus service charge by nonreorganized school districts, was first enacted in 1979. 1979 N.D. Sess. Laws, Ch. 229, § 1.

The compulsory attendance law in effect in 1889, which required every parent to send school age children to a public school, exempted parents from that requirement where "no public school is taught for the time required, and within two miles by the nearest way to the home of such person within the school township." 1883 N.D. Sess.Laws, Ch. 44, § 119. Although this provision was amended occasionally, it was not until 1971 that the Legislature entirely omitted distance between one's residence and the school as a basis for exemption from the compulsory attendance requirement. 1971 N.D.Sess.Laws, Ch. 158, § 5. The compulsory attendance law was amended in 1907 to provide that the district school board, in districts with children residing beyond three miles from the school, "shall provide transportation for such children to and from school." From that time forward state law has in certain circumstances required and in other circumstances merely authorized school districts to participate in transporting or providing compensation for transporting students to and from school.

We do not believe that a detailed chronological recitation and analysis of the statutes relating to student transportation would be helpful in resolving the issue before us. Suffice it to say that our laws on this subject demonstrate a long-standing practice of state and school district involvement in student transportation. However, our laws also clearly demonstrate that the Legislature has never required that the state or school districts assume the entire responsibility or cost of transporting students. Although state and school district involvement in providing student transportation has been significant, the obligation of transporting students to and from school has been shared by the parents or other

caretakers of the children, and the people of this state have acquiesced in sharing that responsibility from the first days of statehood to the present time.¹

Pursuant to Section 15-34.1-01, N.D.C.C., every parent, guardian, or other person having control of any educable child must "send or take such child to a public school" unless an exception applies. A substantively identical provision was in effect at the time our constitution was adopted in 1889. Revised Code 1889, § 759. Section 14-09-08, N.D.C.C., places a duty upon parents to give a child "support and education suitable to the child's circumstances," and a substantively identical provision was likewise in effect in 1889. Revised Code 1889, § 2779.

We believe the long-standing legislative practice of making student transportation a shared responsibility between school districts and parents provides some indication that the constitutional requirement of a "uniform system of free public schools" does not mandate free student transportation.

Such a conclusion is impliedly supported by this court's decision in *Seiler v. Gelhar*, 54 N.D. 245, 209 N.W. 376 (1926). The plaintiff parent in that case asserted that the constitutional mandate of a uniform system of free public schools required the school district to provide actual transportation for his child to and from school. The school district, having determined that it would be prohibitively expensive to provide actual transportation for the plaintiff's child, offered to monetarily compensate the plaintiff based upon a district approved compensation schedule. The court, while recognizing that the proffered compensation was "manifestly inadequate," rejected the plaintiff's constitutional argument:

North Dakota, reported that Webster School, consolidated in 1904, found a family system without remuneration to be the best way of transporting pupils: "Horses are plentiful and where the children are too small to drive, there is always a large boy who will take care of this for his board. . . . When a horse is hitched up, one or two miles, more or less, makes little difference." (page 304)

1. In the book "History of North Dakota" Elwyn B. Robinson provides the following interesting historical perspective regarding "family" responsibility for student transportation:

"Transportation—the conquest of distance on the vast, semiarid grassland—was the key to consolidation and hence to the improvement of rural education. Superintendent John C. West, later president of the University of

"The maximum schedule of compensation authorized is manifestly inadequate, when measured by accepted standards of commercial values, in cases where patrons are situated like the plaintiff in this action. We think the inference is necessary, from the legislation on the subject, that the Legislature did not intend it should be obligatory upon the school board to pay every patron the actual value or cost of the service of transporting his own children to school. We think the Legislature recognized the fact that, while the public is vitally interested in the maintenance of adequate school facilities, of which all children in the state may at all times take advantage, the patron or parent, likewise, has a vital interest in obtaining an education for his child, and that such parental solicitude might be sufficient, in cases like the one at bar, where full compensation could not practically be made, to supply the incentive to transport the child which full compensation for the service, according to the ordinary standards of value, would have furnished.

"The constitutional argument is without merit." 209 N.W. at 379.

The *Gelhar*, *supra*, court recognized that the Legislature, cognizant of the public interest in maintaining school facilities accessible to all children in this state, had attempted to deal with the serious problem of student transportation. The court also recognized, however, that parents have a "vital interest" in obtaining an education for their children, and the court implicitly found a corresponding parental obligation to participate in transporting their children to and from school irrespective of whether full reimbursement from the school district is forthcoming.

We have found only one jurisdiction in which an appellate court has determined whether or not free student transportation is mandated by its state constitution. In *Sutton v. Cadillac Area Public Schools*, 117 Mich.App. 38, 323 N.W.2d 582 (1982),

the Michigan Court of Appeals concluded that transportation of students to and from school is not an essential part of a system of free public education and that failure of a school district to provide free transportation does not violate the Michigan Constitution, which contains a provision substantively identical to Art. VIII, § 2, N.D. Const., requiring the Legislature to provide a system of free public schools. In 1970, prior to the *Sutton* decision, the Michigan Constitution was amended to also provide that "the legislature may provide for the transportation of students to and from any school." That provision, which has no counterpart in our state constitution, weighed in favor of the Michigan court's conclusion that its constitution allows, but does not require, free transportation. *Sutton* does demonstrate, however, that a constitutional provision requiring a system of free public schools does not necessarily encompass free transportation, and in that respect the case is helpful for interpreting our constitutional provision.

The plaintiffs assert that free student transportation must be part of a system of free public schools, because it is an essential element of the education process. No one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein. That does not, however, mean that student transportation is an element or part of the public school system which the constitution requires the Legislature to provide free of charge. In our view transportation is not a necessary element of the educational process, and it is not an integral part of the educational system to which the constitution refers in requiring the Legislature to provide "a uniform system of free public schools." Although transportation may be an important prerequisite to accepting the educational opportunities offered in the public school system it is not part of the system. Other important prerequisites to participating in the educational opportunity offered by the public

school system might include good nutrition and proper immunizations. As in the case of school transportation, the state may wish to participate in the providing of such prerequisites, but Art. VIII, § 2, N.D. Const., does not mandate that it do so.

[1, 2] We hold that Art. VIII, § 2, N.D. Const., does not require the state or school districts to provide free transportation for students to and from school. We further hold that Section 15-34.2-06.1, N.D.C.C., which authorizes charges for schoolbus service, does not violate Art. VIII, § 2, N.D. Const.

The plaintiffs also assert on appeal that the schoolbus charges authorized under Section 15-34.2-06.1, N.D.C.C., violate their rights to equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 22 of the North Dakota Constitution. Although not clearly enunciated, the plaintiffs apparently base their equal protection claim on two separate alleged discriminatory classifications. First, they assert that the transportation charges create a wealth classification which discriminates against poor persons. Second, they assert that the statute, by authorizing only school districts which have not been reorganized to charge a schoolbus service fee, creates a classification between reorganized and nonreorganized districts which discriminates against persons residing in the nonreorganized districts.

There are three separate standards of review for equal protection claims. The standard used in a particular case depends upon the challenged statutory classification and the right allegedly infringed. See *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). If the case involves an inherently suspect classification or an infringement of a fundamental right the statute is subject to strict judicial scrutiny and will be held invalid unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the classification are necessary to further its

purpose. See *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621 (N.D. 1977). An intermediate standard of review is utilized in those cases where "an important substantive right" is involved. *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986). When using the intermediate standard of review we seek to determine whether or not there is a close correspondence between the statutory classification and the legislative goals the statute was designed to achieve. *Patch v. Sebelius*, 320 N.W.2d 511 (N.D. 1982). In all other cases we employ the rational basis standard of review, whereby a legislative classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. *State v. Knoefler*, 279 N.W.2d 658 (N.D. 1979). The rational basis test is the traditional standard for scrutinizing legislation facing equal protection attack and is most often utilized in cases involving economic and social welfare legislation. See *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

[3] In our view the challenged statute in this case is purely economic legislation which neither involves a suspect classification nor a fundamental or important substantive right which would require the strict scrutiny or intermediate standard of review. In similar equal protection challenges to legislation involving student transportation the traditional rational basis standard of review has been employed. *Shaffer v. Board of School Directors*, 687 F.2d 718 (3rd Cir. 1982); *Sutton v. Cadillac Area Public Schools*, 117 Mich.App. 38, 323 N.W.2d 582 (1982); *Harrison v. Morehouse Parish School Board*, 368 So.2d 1113 (La.Ct.App. 1979). We conclude that the rational basis test is the appropriate standard of review for the plaintiffs' equal protection claims in this case. Accordingly, Section 15-34.2-06.1, N.D.C.C., must be upheld unless it is patently arbitrary and fails to bear a rational relationship to any legitimate government purpose.

[4] The plaintiffs assert that the schoolbus service fee authorized by the challenged statute unconstitutionally discriminates against poor or indigent persons because they are more burdened by and have a lesser ability to pay the fee than nonindigent persons. The plaintiffs do not and cannot assert in this case that the fee actually denied their children an opportunity to attend school. The parents have transported their children to and from school at a cost which they concede is substantially greater than the schoolbus fee charged by the School District. A statutory scheme under which a school district offers to provide student transportation at considerably less expense to the parent than self-transportation would entail does not constitute a deprivation which offends either federal or state equal protection rights. The denial of benefit by this legislation, if one can be found, does not constitute the type of detriment or harm against which equal protection rights are intended to protect. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Although Section 15-34.2-06.1, N.D.C.C., authorizes school districts to charge a limited fee for schoolbus service, a substantial part of the cost of that service is paid, under statutory authorization, by state and local tax revenues. We agree with the following statements of the Michigan Court of Appeals in *Sutton*, *supra*, in rejecting the contention that charging for schoolbus service creates a wealth classification that violates the equal protection rights of the poor:

"Allocation of a school district's limited funds to education-related matters other than transportation is not irrational. Equal protection does not require that government choose between attacking every aspect of a problem or not attacking the problem at all. . . . Government does not deny equal protection by making the same grant available to persons of varying economic needs." [Citations omitted.] 323 N.W.2d at 584-585.

We conclude that the charges authorized by Section 15-34.2-06.1, N.D.C.C., are ra-

tionally related to the legitimate governmental objective of allocating limited resources and that the statute does not discriminate on the basis of wealth so as to violate federal or state equal protection rights.

[5] The plaintiffs also contend that Section 15-34.2-06.1, N.D.C.C., violates their equal protection rights by treating reorganized and nonreorganized school districts differently. The statute allows only school districts which have not been reorganized to charge a fee for schoolbus service. Pursuant to Sections 15-34.2-01 and 15-34.2-03, N.D.C.C., a school district may, in its discretion, provide vehicular transportation, provide lodging payments, or provide compensation to families for transporting their children to and from school. Under those sections it is within a school board's discretion whether to avail itself of such options to furnish or compensate student transportation. However, under Section 15-27.3-10, N.D.C.C., a reorganized school district must either provide schoolbus service or compensate families for transporting their children to and from school. We believe the foregoing statutes, to the extent that they treat reorganized and nonreorganized school districts differently regarding student transportation, constitute legislation which is rationally related to a legitimate government purpose. The obvious purpose of such legislation is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system. The legislation provides incentive for the people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district. We conclude that the legislation serves a legitimate government objective and that the statutory scheme is rationally related to accomplishing that objective. Accordingly, we hold that Section 15-34.2-06.1, N.D.C.C., does not violate the federal or state equal protection rights of persons residing in nonreorganized districts.

The judgment of the district court dismissing the plaintiffs' action on its merits is affirmed.

GIERKE and VANDE WALLE, JJ., concur.

LEVINE, Justice, concurring and dissenting.

I join in Part I of the majority opinion holding that free transportation for students to and from school is not constitutionally mandated under the North Dakota Constitution. I dissent, however, from the equal protection analysis. I would hold that North Dakota Century Code § 15-34.2-06.1 and the Dickinson School District policies, as applied to these plaintiffs, violate Article I, § 22, of the North Dakota Constitution. I would therefore reverse the judgment of the district court.

My point of departure with the majority is its reliance on *Shaffer v. Board of School Directors*, 687 F.2d 718 (3 Cir.1982); *Sutton v. Cadillac Area Public Schools*, 117 Mich.App. 38, 323 N.W.2d 582 (1982); and *Harrison v. Morehouse Parish School Board*, 368 So.2d 1113 (La.Ct.App.1979), for its conclusion that under the North Dakota Constitution, the rational basis standard of review is appropriate for a wealth-based equal protection challenge to legislation authorizing a fee to be charged for transportation and that the legislation so reviewed passes constitutional muster. These cases rest on the proposition that, under the federal Constitution, education is not a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). They provide little support and less guidance for holding that in North Dakota, where education is a fundamental right, one guaranteed by the North Dakota Constitution, access to that fundamental right is not important enough to be reviewed with stricter scrutiny than we review purely economic legislation.

The question before us, which the cases cited by the majority do not help us decide, is whether transportation provided by a

school district is an important substantive right so as to warrant an intermediate standard of review which affords no presumption of constitutionality to the legislation authorizing a fee to be charged for this transportation.

We hold in this case that free busing is not constitutionally mandated. However, neither is a criminal appeal. Yet, an indigent criminal defendant is entitled to access to the appellate process. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). While wealth alone may not be sufficient to require strict judicial scrutiny, where wealth-based discrimination coalesces with an important individual interest, an intermediate standard of review is appropriate. *Griffin, supra*; *Douglas, supra*; *Plyler v. Dole*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). See also *State v. Carpenter*, 301 N.W.2d 106 (N.D.1980). *Griffin* and *Douglas* recognized that without an attorney or a transcript, an appeal is meaningless. So too, without access to education, the right to education is meaningless. Furthermore, unlike the right to appeal, the right to education is a fundamental right under our State Constitution. *In re G.H.*, 218 N.W.2d 441 (N.D.1974).

In *Plyler, supra*, the United States Supreme Court recognized that education plays a fundamental role in society. Under review in *Plyler* was a Texas statute limiting public education funds to citizens and aliens, resulting in local policies requiring tuition to be paid by illegal aliens. The Court employed an intermediate standard of review under which the deprivation of education would be constitutionally sound only if it furthered a substantial goal of the State. No such goals were demonstrated and so the Court found a violation of the equal protection clause under the fourteenth amendment of the United States Constitution.

In a rural state like ours, it is clear that transportation is extremely important to

KADRMAS v. DICKINSON PUBLIC SCHOOLS N. D. 905

Cite as 402 N.W.2d 977 (N.D. 1987)

education. Without transportation, some children would be literally cut off from education. I would therefore apply an intermediate level of scrutiny to the statute in question to determine whether there is a close correspondence between the statutory classification and the legislative goals the statute was designed to achieve. *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986).

The only goal the State can assert to support the statute and its burden on the poor is a financial goal. The objective must be that it is necessary to raise more money than is provided by taxation. However, there is evidence that the district could provide busing to the poor within its present budget without cutting other services. It is also noteworthy that athletes are bused to athletic competitions without charge. Each of us is aware of the economic recession in our State. The energy and agricultural sectors are seriously depressed. We read and hear about the need to cut back, to pull in our belts. Nonetheless, our need to conserve financial resources may not be implemented by depleting our constitutional resources. Our "concern for the preservation of [financial] resources standing alone can hardly justify the classification used in allocating those resources." *Plyler, supra*, 457 U.S. at 227, 102 S.Ct. at 2400 (citing *Graham v. Richardson*, 403 U.S. 365, 374-375, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971)).

The school district's policies in implementing NDCC § 15-34.2-06.1 are to charge the same fee to all families whose children ride the bus. No waiver of transportation fee has ever been made, nor has the fee ever been modified. There is no consideration of a family's income in setting the fee. Thus, where an indigent parent is unable to pay for transportation, she is simply out of luck. The trial court found the gross income of one plaintiff to be at or near poverty level, and the income of the second plaintiff substantially below the

poverty income level. While I agree with the majority that parents share with the State the obligation to transport their children to school, both the State and the school district must recognize that some parents are financially unable to fulfill this obligation without onerous consequences. Because the statute and the policies implementing that statute exclude the plaintiffs, solely because of their indigency, from the exercise of an important right, i.e., to participate in busing provided by the school district, I believe they do not operate uniformly and violate Article I, § 22 of the North Dakota Constitution. I would therefore reverse the district court judgment.

As for the majority's treatment of the nonreorganized-reorganized classification, I would decline to consider the issue because it was raised only in the reply brief. We are thus without the benefit of a responsive brief. We have often said that we do not consider constitutional issues not properly raised. I believe that principle should prevail here. We need to preserve our limited judicial resources and I would refrain from undertaking the resolution of a constitutional question raised in a reply brief. This is not the heavy artillery we have preached is necessary for constitutional questions.

I therefore concur in the first portion of the opinion. From the remainder, I respectfully dissent.

LEVINE and MESCHKE, JJ., concur.



ORIGINAL

No. 86-713

86-7113
(S.L. 12, P. 41)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

Paula Kadrmas, and Sarita Kadrmas,)
by next friend, Paula Kadrmas,)
APPELLANTS,)
vs.)

Dickinson Public Schools, Ross Julson)
in his capacity as Superintendent)
of the Dickinson Public Schools,)
Clarence Storseth, Nancy Johnson)
Merry Johnston, Harold Krieg, Herb)
Herauf, in their capacity as members)
of the Dickinson School Board,)

Richard Rykowski,)
in his capacity as Transportation)
Supervisor of the Dickinson Public)
Schools,)
APPELLEES.)

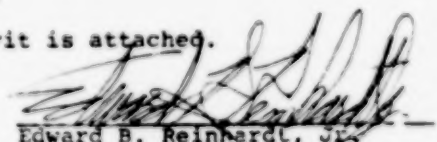
Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOLO, JR.
CLERK

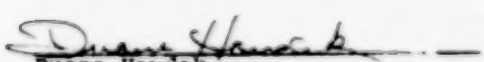
ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

MOTION TO PROCEED IN FORMA PAUPERIS

The appellants, Paula Kadrmas and Sarita Kadrmas through her next friend, Paula Kadrmas ask leave to file the attached jurisdictional statement without prepayment of costs and to proceed in forma pauperis. Appellants also ask relief from printing requirements of the Court. The appellants did not proceed in forma pauperis below, but upon motion, were designated indigent by the trial court, which under North Dakota law relieved them from filing an appeal bond in the Court below.

Appellant's affidavit is attached.


Edward B. Reinhardt, Jr.
North Dakota Legal Services, Inc.
P.O. Box 217
New Town, ND 58763
Counsel of Record


Duane Houdek
Legal Assistance of North Dakota, Inc.
of Counsel

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor, by her next friend, Paula Kadrmas, Appellants,

v.


DICKINSON PUBLIC SCHOOLS: ROSS JULSON, in his capacity as Superintendent of the Dickinson Public Schools; CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD KRIEG, HERB HERAUF, in their capacity as members of the Dickinson School Board; RICHARD RYKOWSKY, in his capacity as Transportation Supervisor of the Dickinson Public Schools, Appellees.

AFFIDAVIT OF FILING BY MAIL

Edward B. Reinhardt, Jr., being first duly sworn, deposes and says:

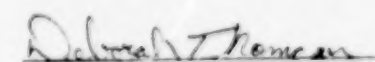
I am a member of the Bar of the Supreme Court of the United States.

On June 19, 1987, at approximately 4:24 p.m., I deposited at the United States Post Office, Bismarck, North Dakota, an envelope addressed to the Clerk of the Supreme Court of the United States, first class postage prepaid, containing a Notice of Appearance, an original and ten copies of the Jurisdictional Statement in the above-entitled action, an original and ten copies of the Motion to proceed in forma pauperis and attached affidavit, and an original and ten copies of the certificate of service in the above-entitled action.


Edward B. Reinhardt, Jr.
North Dakota Legal Services, Inc.
P.O. Box 217
New Town, ND 58763
701/627-4719

State of North Dakota)
)ss.
County of Burleigh)

Subscribed and sworn to before me this 19 day of June, 1987.


Notary Public
My commission expires: 1-20-1992

The Dickinson Public School District is not a re-organized school district and presently maintains an optional school bus transportation system which provides daily transportation for 585 students, both public and parochial. Transportation by school bus is available only to students who attend elementary school and reside at least three miles from the school building which they attend classes, and to secondary school students who reside at least four miles from the school building which they attend classes. The optional school busing policy of the Dickinson Public School System provides for transportation of the student from his residence to his school building and return. It developed into an optional door to door transportation system as a result of a 1973 election whereupon those parents of students who resided beyond minimum distances as indicated, approved of the present door to door transportation policy and approved the authorization of a transportation fee scheduled which complies with section 15-34.2-01 of the North Dakota Century Code. That transportation fee schedule provides in pertinent part for daily school transportation for one child at \$97.00 per year and for two children at \$150.00 per year.

The Dickinson Public School transportation policy for 1985-86 further provides that no student will be transported until the parents or guardian of such student has executed and delivered to Dickinson Public Schools a transportation agreement, and has either made payment of the transportation fee in accordance with the schedule or has made prior arrangement for payment of the same as approved by the Dickinson Public School Administration.

Plaintiff Kadrmas and her family have gross income at or near the poverty level as established by the North Dakota Department of Human Services while the income of Plaintiff Hall is substantially below the poverty income level. Each of the said Plaintiffs have elected not to enter into transportation agreements with the Dickinson Public School System, and have made private arrangements for the transportation of each of their students to

and from school daily. None of the students of the Plaintiffs herein have been absent from school due to lack of transportation. None of the children herein involved are handicapped children or have any special needs.

ISSUES

The Plaintiffs herein challenge the constitutional basis for section 15-34.2-01 and section 15-34.2-06.1 of the North Dakota Century Code. Plaintiffs contending that transportation is an essential and integral part of a free public school education, that the foregoing statutes which authorize discretionary transportation of public school students, is inconsistent with Article VIII, Section 2 of the North Dakota Constitution, and therefore unconstitutional.

Plaintiffs further contend that said statutes are contrary to Article I, Section 22 of the North Dakota Constitution, in that said statutes and application thereof by a uniform fee schedule for optional transportation, does not have a uniform application to each of said Plaintiffs due to their respective economic position.

Finally, Plaintiffs challenge the constitutionality of said statutes upon the basis that the same are discriminatory on the grounds of economic wealth, and therefore violative of the equal protection clause of the 14th Amendment to the U.S. Constitution.

Plaintiffs further contend that statutory authority permitting the existence of two different types of school districts within the State of North Dakota, one being the original district while the second is the re-organized school district, whereby the former is not required to maintain a transportation system while the latter is, is in violation of Article VII, Section 2 of the North Dakota Constitution.

DECISION

Each of Section 15-34.2-01 and 15-34.2-06.1 are entitled to the presumption of validity unless or until it has been clearly shown that

each of said statutes contravene either the North Dakota or the United States Constitution. Patch v Sebelius, 320 N.W. 2d 511

Plaintiffs seek to overcome the foregoing constitutional presumption by arguing to the Court that school bus transportation of students is an essential and intregal part and provision of a free public school education. North Dakota Constitution Article VIII, Section 2, states as follows:

"The legislative assembly shall provide for a uniform system of free public school throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education."

Plaintiffs are correct that "All children in North Dakota have the right, under the State Constitution, to a public school education." In Interest of G.H. 218 N.W. 2d 441. Education reasonably defined as the totality of the information and qualities required through instruction and training which further the development of an individual physically, mentally, and morally, does not include all human acts preparatory thereto, including transportation and delivery of the student to the place of learning.

The Plaintiffs offer no authority nor can this court identify any authority to support Plaintiff's argument that the transportation of public school students to and from their place of residence is encompassed within the concept of a public school education. Clearly the selection of ones location of residence and the inherant need to travel to and from the place of learning by public school students, is common to all within the public school district. Accordingly, the standard of review of sections 15-34.2-06.1 and 15-34.2-01 of the North Dakota Century Code is the standard of the traditional reasonable or rational basis of standard. Arneson v Olson, 270 N.W. 2d 125.

Plaintiffs offer that the term free public schools must necessarily mean and include those items which are essential to education, and therefore

since it is obviously necessary to travel to and from a public school, that transportation of public school students come within the definition of "essential" to education. Cardiff v Bismarck Public School District 263 N.W. 2d 105. This Court however believes that there is a real and substantive distinction between text books and school bus transportation. The former is an indispensable tool with which to impart knowledge and learning, while the latter constitutes at best only one means by which to accomplish availability so as to enjoy the fundamental right to a public school education.

While the Michigan court in Sutton v Cadillac Area Public Schools 323 N.W. 2d 582, was confronted with the language with moderate differences from that of the North Dakota Constitution, the Michigan Constitution at Article 8, Section 2 provided as follows:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for a free education of its pupils without discrimination as to religion, creed, race, color or national origin."

The fundamental concept encompassed within the Michigan Constitution is in substance that which is present in the North Dakota Constitution. Therein the Michigan Court adhering to the standard set forth in San Antonio Independent School District vs Rodriguez, 411 U.S. 1 rejected the application of the strict scrutiny compelling State interest test, and applied the rational basis test, and therein determined that transportation of public school students to and from schools is not analagous to books and school supplies. This Court believes the Sutton decision to be sound.

The second challenge of the Plaintiffs is that two different types of school districts, one of which is mandated to encompass transportation and the other which is not, fails to meet the constitutional standard set forth in Article VIII, Section 2 of the North Dakota Consttution. It is important to recognize that each school district is accorded reasonable

flexibility so as to accommodate the individual needs of each given district, and that a uniform system of free public schools is not synonymous with identical schools or transportation systems. Having previously determined that transportation of public school students by public school bus does not fall within the concept of a free public school education, this Court finds the challenge of the Plaintiffs to be without merit. Historically it is well established that re-organized school districts are the result of rural school districts with declining enrollment and that statutorily mandated transportation systems is only a means by which to facilitate the opportunity for enjoyment of the fundamental right of a free public school education. It should be noted that the transportation system employed in any re-organized school district is left to the discretion of the individual district.

Finally, Plaintiffs argue that the guarantees of equal protection of laws contained in Article 14 of the United States Constitution and Article I, Section 22 of the North Dakota Constitution are denied to the Plaintiffs by virtue of the fact that the schedule of fees charged by the Dickinson Public School District are discriminatory based on wealth. Absent the fundamental right or a suspect classification, the test of whether a government classification violates the constitutional guarantees of equal protection is whether the classification has a rational basis. San Antonio School District v Rodriguez 411 U.S. 1. Herein, transportation fees implemented by the Dickinson Public School District is strictly controlled by Section 15-34.2-06.1 of the North Dakota Century Code, and does have a rational basis. The amount of such fees may not exceed the actual cost less State transportation payments received by the local school district, and the schedule of such fees predicated upon the number of children in each family utilizing such transportation is clearly a rational basis for the same.

The Supreme Court of North Dakota in Seiler vs Gelhar, 209 N.W. 376, determined that the Constitution of the State of North Dakota did not mandate each school district to furnish public school bus transportation to each public school student, and the discretion was lawful and permissible within the school district to employ the most economic means by which to facilitate a free public school education. That same flexibility, although under different statutes, is the concept granted to the Dickinson Public School District and all original school districts under the provisions of Section 15-34.2-06.1 and 15-34.2-01 of the North Dakota Century Code.

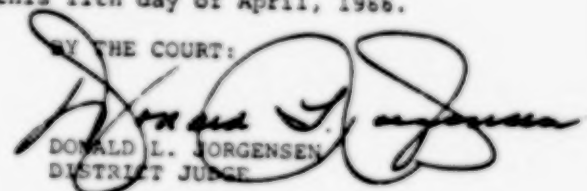
It is therefore the decision of this Court that Plaintiff's constitutional challenge to each of Section 15-34.2-06.1 and 15-34.2-01 of the North Dakota Century Code fails to meet the burden of proof necessary to sustain that challenge.

It is therefore the Order of this Court that the Defendants are entitled to a Judgment of Dismissal of the foregoing action.

It is the further Order of the Court that legal counsel for the Defendant shall prepare Findings of Fact, Conclusions of Law and Order for Judgment in accordance herewith.

Dated at Hettinger, N.D. this 11th day of April, 1986.

BY THE COURT:


DONALD L. JORGENSEN
DISTRICT JUDGE

CERTIFICATE

I, Jim Hallen, certify that I have this 11th day of April, 1986, placed in the U.S. Mails, a true and correct copy of this Order to Michael Geiermann, George Dynes, Dwayne Houdek & Ed Reinhart, Attorneys of record in this matter.


JIM HALLEN - COURT CLERK

STATE OF NORTH DAKOTA
COUNTY OF STARK

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT

Paula Kadrmas; Marsha Hall;
Sarita Colton, a minor, by
her next friend, Paula Kadrmas;
Yvonne Hall, a minor, by her
next friend, Marsha Hall;
Howard Hall, a minor, by his
next friend, Marsha Hall,

Plaintiffs,

vs

Dickinson Public Schools; Ross
Julson, in his capacity as
Superintendent of the Dickinson
Public Schools; Clarence Storseth,
Nancy Johnson, Merry Johnston,
Harold Krieg, Herb Herauf, in their
capacity as members of the Dickinson
School Board; and Richard Rykowski,
in his capacity as Transportation
Supervisor of the Dickinson Public
Schools,

Defendants,

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER FOR JUDGMENT

The above entitled matter came on for trial before the Court at the Courthouse in Dickinson, N.D. on December 19th, 1985, at which time and place the Plaintiffs appeared in person and through their attorneys, Dwayne Houdek, Bismarck, N.D. and Edward Reinhart, New Town, N.D., and the Defendants appearing by and through their legal counsel Attorney George T. Dynes, of the Law Firm of Freed, Dynes, Reichert & Buresh, P.C., Dickinson, N.D. The case then proceeded to trial and at the conclusion thereof, the parties submitted additional briefs. After considering the entire matter, including all briefs and arguments of the parties, and having entered its Memorandum Decision dated April 11, 1986, the Court now makes the following:

FINDINGS OF FACT

I

That the Plaintiff, Paula Kadrmas, is the mother of Sarita Colton,

1

a minor child, who enrolled in the Dickinson Public School System. Said Plaintiff resides three fourths of one mile South of New Hradek, North Dakota, a distance of approximately 16 miles from the School in Dickinson where Sarita Colton attends classes.

II

That the Plaintiff Marsha Hall, is the mother of Yvonne Hall and Howard Hall, both minor children enrolled in the Dickinson Public School System. Said Plaintiff resides in the town of New Hradek, North Dakota, a distance of approximately sixteen miles from the respective school buildings in Dickinson where said minor children attend classes.

III

That the Dickinson Public School District is not a reorganized school district and for many years past has operated an optional school bus and transportation system which offers daily bus transportation for a portion of the students in said district, both public and parochial.

IV

That at the time of trial bus transportation was being furnished to 585 students, both public and parochial, of which 437 were public school students out of a total of 3,300 students in the Dickinson Public Schools. Therefore, of the public school students, approximately 13% were obtaining bus transportation and the remaining 87% were furnishing their own transportation to and from school.

V

Those students obtaining bus transportation were given door to door service from their homes to their respective school buildings, which door to door service was instituted as a result of a 1973 election in which the participating parents elected to pay a fee for door to door service. That during the current year transportation fee charged was \$97.00 for one student (applicable to Sarita Colton) and \$150.00 for

-2-

two students (applicable to the Hall children). Said fees were for the entire school year. The total of such fees charged to all patrons of the bus system of the Dickinson Public School District total approximately \$34,000.00 annually, which charges were in compliance with the provisions of section 15-34.2-06.1 of the North Dakota Century Code.

VI

The total transportation expenses of the Dickinson Public School District for busing children from home to school and for the last school year (1984-85) were \$312,147.00. Of that amount approximately \$244,000.00 was reimbursed to the school district by the State of North Dakota, leaving a deficit of approximately \$68,000.00. The deficit in turn was paid approximately one-half by the bus fees and the other half, approximately \$34,000.00 was paid for out of the general funds generated by the payment of local real estate taxes.

VII

The Dickinson bus system is available only to those high school students residing more than four miles from school and grade school students residing more than three miles from school. Such mileage limitations have been imposed by the Dickinson Public School Board pursuant to the provisions of Section 15-34.2-01 of the North Dakota Century Code.

VIII

The Plaintiffs Hall and Kadrmas refused to sign an agreement to pay busing fees for the 1985-86 school year and, based upon such refusal were denied use of the bus system by the Dickinson Public School District. No other children within the entire school district, residing beyond the three and four mile limits, were denied use of the bus system and in all of those instances, agreements to pay the annual fee were signed prior to the commencement of the 1985-86 school year.

-7-

IX

Both Plaintiffs have made separate arrangements for transporting their children to and from school each day, and such transportation costs greatly exceed the bus fees charged by the Dickinson District. It would be economically beneficial to the Plaintiffs if they were to use the bus system and pay the requested fee, rather than to pursue the present policy of using their own vehicles for school transportation.

X

No advance waiver of the busing fees has ever been made under the Dickinson School District's busing policy, nor have either of the Plaintiffs herein made application for the same.

XI

No busing fee imposed by the Dickinson Public School District has ever been lowered or adjusted by the District on the basis of a parents ability or inability to pay the same, and neither Plaintiff herein petitioned the Dickinson Public School District to lower or adjust the transportation fees in their respective instances.

XII

Plaintiff Kadrmas and her family have gross income at or near the poverty level, as established by the North Dakota Department of Human Services, while the income of the Plaintiff Hall is substantially below the poverty income level.

XIII

None of the children of either Plaintiff are handicapped, or have any special needs. All of them appear to be properly cared for and none have been absent from school because of the lack of access to the bus system.

XIV

That although both of the Plaintiffs owe the Dickinson Public

-8-

School District for transportation fees from prior years, that existing debt would not deny their children access to the bus system during the current year. All that the Dickinson District has required is that the parents sign the written agreement to pay fees and to make a bona fide effort to pay on those obligations.

XV

The Court finds as a matter of fact, that the Dickinson Public School District has complied in all respects with the requirements of Section 15-34.2-06.1 of the North Dakota Century Code and that all fees charged are in compliance with that statute.

XVI

The Court finds that the bus system maintained by the Dickinson Public School District, although available only to a limited number of students, is operated in compliance with section 15-34.2-01 of the North Dakota Century Code.

From the foregoing findings of fact, the Court herewith makes the following:

CONCLUSIONS OF LAW

I

That the school bus system operated by the Dickinson Public School District, including the fees charged to these Plaintiffs and any other bus patrons, is in conformance with Section 15-34.2-06.1 and Section 15-34.2-01 of the North Dakota Century Code, and all other applicable statutes.

II

That Section 15-34.2-01 and Section 15-34.2-06.1 are constitutional and do not violate any of the provisions of either the United States or the North Dakota Constitution.

-5-

III

Providing transportation from homes to school is not an essential or integral part of a system of free public schools, and in the absence of a legislative mandate, is not required.

IV

The fees charged to the Plaintiffs and other bus patrons of the Dickinson Public School District are reasonable, are within the limitation prescribed in Section 15-34.2-06.1 of the North Dakota Century Code, and appropriately apply to all bus patrons on the same basis.

V

The Constitutional standard of review of the statutes in question is the rational basis standard and not that of strict scrutiny.

VI

That Section 15-34.2-01 and Section 15-34.2-06.1 of the North Dakota Century Code have been given uniform operation in this case and do not violate Article I, Section 22 of the North Dakota Constitution.

VII

The bus fee schedule does not violate any constitutional guarantees of equal protection. The fees are strictly controlled by Section 15-34.2-06.1 of the North Dakota Century Code, which has a rational basis.

VIII

That all actions by all of the Defendants have been in compliance with the applicable statutes and in compliance with all constitutional guarantees.

IX

That the Defendants are entitled to a Judgment in this case in their favor and against all of the Plaintiffs, providing for a dismissal of Plaintiffs Complaint in all respects. Further, that neither party

-6-

hereto shall be entitled to costs or disbursements as a result of the foregoing litigation.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 30th day of April, 1986 at Hettinger, N.D.

BY THE COURT:

DONALD L. JORGENSEN
DISTRICT COURT

CERTIFICATE

I, Jim Hallen, certify that I have this 1st day of May, 1986, placed in the U.S. Mail, a true and correct copy of these Findings of Fact, Conclusions of Law & Order for Judgment to Dwayne Houdek, Ed Reinhart & George Dynes, Attorneys of Record in this matter.

Jim Hallen
Jim Hallen

-7-

STATE OF NORTH DAKOTA
COUNTY OF STARK

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT

Docket No. 371-CV 85

Paula Kadrmas; Marsha Hall;
Sarita Colton, a minor, by
her next friend, Paula Kadrmas;
Yvonne Hall, a minor by her
next friend, Marsha Hall;
Howard Hall, by his next
friend, Marsha Hall,

Plaintiffs,

vs.

Dickinson Public Schools;
Ross Julson, in his capacity
as Superintendent of the
Dickinson Public Schools;
Clarence Storseth, Nancy Johnson,
Merry Johnston, Harold Krieg,
Herb Herauf, in their capacity
as members of the Dickinson
School Board; and Richard
Rykowsky, in his capacity
as Transportation Supervisor
of the Dickinson Public Schools;

Defendants.

NOTICE OF ENTRY
OF JUDGMENT

TO THE ABOVE NAMED PLAINTIFFS AND THEIR ATTORNEYS, EDWARD B.
REINHARDT, JR. AND DUANE HOUDEK:

PLEASE TAKE NOTICE that judgment in the above entitled
action was entered and filed in the office of the clerk of the
above entitled court on May 6, 1986. Said judgment is in favor

REED, DYNES, REICHERT
& BURESH, P.C.
ATTORNEYS AT LAW
DRAWER 8
DICKINSON, ND 58602-6306

-1-

of the defendants and for a dismissal of the plaintiffs' claims. Attached hereto and served upon you with this notice of entry of judgment is a copy of the judgment.

Dated this 7th day of May, 1986.

FREED, DYNES, REICHERT & BURESH, P.C.
Attorneys for Dickinson Defendants
34 East First Street, P.O. Drawer K
Dickinson, North Dakota 58602

BY:

/s/ George T. Dynes

GEORGE T. DYNES

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing NOTICE OF ENTRY OF JUDGMENT, with copy of judgment attached, were served upon:

Mr. Edward B. Reinhardt, Jr.
North Dakota Legal Services, Inc.
P. O. Box 217
New Town, North Dakota 58763

Mr. Duane Houdek
Legal Assistance of North Dakota
P. O. Box 1893
Bismarck, North Dakota 58502

Mr. Michael J. Geierman
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

by first class mail deposited at the U. S. Post Office in Dickinson, North Dakota, on the 7th day of May, 1986.

/s/ George T. Dynes
George T. Dynes

ED. DYNES, REICHERT
& BURESH, P.C.
ATTORNEYS AT LAW
DRAWER K
DICKINSON, ND 58602-0300

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF STARK

SOUTHWEST JUDICIAL DISTRICT

Paula Kadrmas; Marsha Hall; Sarita)
Colton, a minor, by her next)
friend, Paula Kadrmas; Yvonne Hall,)
a minor, by her next friend, Marsha)
Hall; Howard Hall, a minor, by his)
next friend, Marsha Hall,)

Plaintiffs,)

-vs-)

J U D G M E N T

Dickinson Public Schools; Ross)
Julson, in his capacity as)
Superintendent of the Dickinson)
Public Schools; Clarence Storseth,)
Nancy Johnson, Merry Johnston,)
Harold Krieg, Herb Herauf, in their)
capacity as members of the)
Dickinson School Board; Richard)
Rykowsky, in his capacity as Trans-)
portation Supervisor of the)
Dickinson Public Schools; and Wayne)
Sanstead, in his capacity as)
Superintendent of Public)
Instruction,)

Defendants.)

CIVIL NO. 371-CV85

The above entitled matter came on for trial before the Court at the Courthouse in Dickinson, North Dakota, on December 19, 1985, at which time and place the Plaintiffs appeared in person and through their attorneys, Duane Houdek and Ed Reinhardt, and the Defendants appeared by and through their counsel, George T. Dynes, of the firm of Freed, Dynes, Reichert & Buresh, P.C. The case then proceeded to trial and at the conclusion thereof the parties submitted additional briefs. After considering the entire matter, including all briefs and arguments of the parties, and having entered its Memorandum Decision dated April 11, 1986,

FREED, DYNES, REICHERT
& BURESH, P.C.
ATTORNEYS AT LAW
DRAWER K
DICKINSON, ND 58602-0300

and having entered its Findings of Fact, Conclusions of Law and Order for Judgment:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, DETERMINED AND DECREED AS FOLLOWS:

I.

That the school bus system operated by the Dickinson Public School District, including the fees charged to these Plaintiffs and any other bus patrons, is in conformance with Section 15-34.2-06.1 and 15-34.2-01 NDCC, and all other applicable statutes.

II.

That Sections 15-34.2-01 and 15-34.2-06.1 are constitutional and do not violate any of the provisions of either the United States or the North Dakota Constitution.

III.

Providing transportation from home to school is not an essential or integral part of a system of free public schools and, in the absence of a legislative mandate, is not required.

IV.

The fees charged to the Plaintiffs and other bus patrons of the Dickinson District are reasonable, are within the limitations prescribed in Section 15-34.2-06.1 NDCC and appropriately apply to all bus patrons on the same basis.

V.

The Constitutional Standard of Review of the statutes in question is the rational basis standard and not that of strict scrutiny.

-2-

REED, DYNES, REICHERT
& BURESH, P.C.
ATTORNEYS AT LAW
DRAWER 8
DICKINSON, ND 58501-6300

VI.

That Sections 15-34.2-01 and 15-34.2-06.1 NDCC have been given uniform operation in this case and do not violate Article I, Section 22 of the North Dakota Constitution.

VII.

The bus fee schedule does not violate any constitutional guarantees of equal protection. The fees are strictly controlled by 15-34.2-06.1 NDCC, which has a rational basis.

VIII.

That all actions by all of the Defendants have been in compliance with the applicable statutes and in compliance with all constitutional guarantees.

IX.

The Defendants are entitled to and are herewith granted judgment in their favor and against all of the Plaintiffs, and accordingly this action by the Plaintiffs is dismissed in all respects. None of the parties is entitled to any costs as a result of this litigation.

WITNESS, The Hon. Donald L. Jorgensen, Judge of the above entitled Court, and my hand and the seal of said Court, this 6th day of May, 1986.

/s/ Paulette Reule
Paulette Reule,
Clerk of the District Court

REED, DYNES, REICHERT
& BURESH, P.C.
ATTORNEYS AT LAW
DRAWER 8
DICKINSON, ND 58501-6300

-3-

IN THE SUPREME COURT
STATE OF NORTH DAKOTA


Paula Kadrmas, and Sarita Colton,
by next friend, Paula Kadrmas,
APPELLANTS,
VS.
Dickinson Public Schools, Ross Julson
in his capacity as Superintendent
of the Dickinson Public Schools,
Clarence Storseth, Nancy Johnson
Merry Johnston, Harold Krieg, Herb
Herauf, in their capacity as members
of the Dickinson School Board,
Richard Rykowsky,
in his capacity as Transportation
Supervisor of the Dickinson Public
Schools,
APPELLEES.


Civ. No. 11262

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Paula Kadrmas and Sarita
Colton, by her next friend, Paula Kadrmas, the appellants
above-named, hereby appeal to the Supreme Court of the
United States from the final judgment of the Supreme Court
of the State of North Dakota, affirming the dismissal of the
complaint, entered in this action on March 26, 1987.

This appeal is taken pursuant to 28 U.S.C. Sec.
1257(2).


Edward B. Reinhardt, Jr.
Counsel of Record
North Dakota Legal Services, Inc.
P.O. Box 217
New Town, ND 58763


Duane Houdek
Legal Assistance of North Dakota, Inc.
of Counsel

Filed June 19, 1987 Attorneys for Appellant

STATE OF NORTH DAKOTA
COUNTY OF STARK

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT

PAULA KADRMAS,
MARSHA HALL,
SARITA COLTON, a minor,
by her next friend, Paula Kadrmas,
YVONNE HALL, a minor,
by her next friend, Marsha Hall,
HOWARD HALL, a minor,
by his next friend, Marsha Hall,
PLAINTIFFS,
VS.
DICKINSON PUBLIC SCHOOLS,
ROSS JULSON,
in his capacity as Superintendent of
the Dickinson Public Schools,
CLARENCE STORSETH,
NANCY JOHNSON,
MERRY JOHNSTON,
HAROLD KRIEG,
HERB HERAUF,
in their capacity as members of the
Dickinson School Board,
RICHARD RYKOWSKY,
in his capacity as Transportation
Supervisor of the Dickinson Public
Schools,
WAYNE SANSTEAD,
in his capacity as Superintendent of
Public Instruction,
DEFENDANTS.)

AMENDED COMPLAINT

Civil No. 371-CV85

COMES NOW the Plaintiffs, who state to the Court as follows:

INTRODUCTION

This is an action for declaratory and injunctive relief to
prevent the Dickinson Public Schools from charging fees to

parents living in rural areas for busing their children to school. This action seeks to have N.D.C.C. 15-34.2-06.1 and N.D.C.C. 15-34.2-01 declared unconstitutional based on both state and federal grounds, and to halt the unconstitutional application of N.D.C.C. 15-34.2-06.1 by the Dickinson Public Schools.

2.

The Plaintiff, Paula Kadrmas, is a resident of the town of New Hradec, located in Dunn County, North Dakota. She is unemployed. Her husband is currently employed on a temporary basis doing oil field work. She and her husband have three (3) children, one (1) of which is enrolled in Dickinson Public Schools.

3.

The Plaintiff, Marsha Hall, is also a resident of the town of New Hradec, North Dakota. She is a single parent and is employed part-time as a black jack dealer and cashier in Dickinson, North Dakota, and has two (2) children enrolled in the Dickinson Public Schools.

4.

The Plaintiff, Sarita Colton, is the child of Plaintiff Kadrmas. She is in the fourth grade and attends Roosevelt Elementary School in Dickinson.

5.

The Plaintiff Yvonne Hall, is the child of Plaintiff Marsha Hall. She is in the fourth grade and attends Berg Elementary

School in Dickinson.

6.

The Plaintiff, Howard Hall, is the child of the Plaintiff Marsha Hall. He is in the ninth grade and attends Dickinson High School.

7.

The Defendant Dickinson Public Schools is a public school district and is governed by the provisions of Title 15, N.D.C.C.

8.

The Defendant, Ross Julson, is Superintendent of the Dickinson Public Schools and is responsible for implementing the policies of the School Board.

9.

The Defendants Clarence Storseth, Nancy Johnson, Merry Johnston, Harold Krieg, and Herb Herauf are members of the School Board of Dickinson Public Schools and as such are responsible for initiating the policy of charging parents for busing their children.

10.

The Defendant, Richard Rykowsky, is Transportation Supervisor for the Dickinson Public Schools, and is responsible for enforcing School Board policy regarding busing fees.

11.

The Defendant, Wayne Sanstead, is Superintendent of Public Instruction of North Dakota and is responsible for general

supervision of the common and secondary schools of the state, pursuant to N.D.C.C. 15-21-04.

FACTUAL ALLEGATIONS

12.

Plaintiffs Colton, and Yvonne and Howard Hall are enrolled in the Dickinson Public Schools; they became members of the Dickinson Public Schools after the public schools in New Hradec were closed due to a lack of funds.

13.

The Dickinson Public Schools has adopted a policy wherein parents of children who are being bused to school must pay a yearly fee to the school district; fees are assessed on a per public basis.

14.

The Dickinson Public Schools requires that parents enter into a written agreement before their children will be transported; failure to sign an agreement results in a denial of busing. (A copy of the agreement, which contains a schedule of fees, is attached as Exhibit 1).

15.

The fee schedule for busing contains no provision for waiver, nor are the fees based upon a family's income or ability to pay.

16.

Plaintiff Kadrmas and Plaintiff Hall have refused to sign

transportation agreements.

17.

Plaintiff Kadrmas has been informed by Defendant Rykowsky that her child (Plaintiff Colton) would not be bused if she did not sign a transportation agreement. The school bus did not stop at her house on the first day of school, August 28, 1985, and it has not stopped at her house at any time since then. She has had to alternate driving her child to or from school since August 28, 1985. Her family only has one vehicle, which must also be used to help get her husband to work.

18.

Plaintiff Hall has also been informed by Defendant Rykowsky that her children (Plaintiffs Yvonne Hall and Howard Hall) would not be bused if she did not sign a transportation agreement. She was given the option of having her children transported on August 28 only, with transportation provided in the future only if she signed an agreement. Transportation has not been offered to her children since that date, and she has been forced to drive her children to or from school, and alternates driving with friends.

19.

Plaintiff Kadrmas and Plaintiff Hall both live approximately 10-12 miles from Dickinson, which is the distance their children would have to be transported.

20.

Plaintiff Hall and Plaintiff Kadrmas are compelled by

N.D.C.C. 15-34.1-01 to send their children to school; failure to do so would subject them to criminal prosecution under N.D.C.C. 15-34.1-04.

21.

The authority for the Dickinson Public Schools policy of charging transportation fees stems from two sources: (1) N.D.C.C. 15-34.2-01, (attached as Exhibit 2) which makes provision of bus transport optional, and (2), N.D.C.C. 15-34.2-06.1 (attached as Exhibit 3), which allows school districts which have not reorganized to charge fees for transportation service.

22.

The Dickinson Public Schools have not reorganized, and, having exercised their option to provide transportation pursuant to N.D.C.C. 15-34.2-01, is authorized by N.D.C.C. 15-34.2-06.1, to charge transportation fees.

23.

The policy requiring payment of transportation fees is a law within the meaning of the North Dakota Constitution as it derives its authority from N.D.C.C. 15-34.2-06.1.

24.

If Plaintiff Kadrmas were required to pay the transportation fee to the Dickinson Public Schools, she would have to use money that could otherwise be used to provide necessities to her children, including Plaintiff Colton, which would subject

Plaintiff Colton, as well as her other children, to unwarranted hardship.

25.

If Plaintiff Hall were required to pay the transportation fee to the Dickinson Public Schools, she would also be forced to use money that could otherwise be used to provide necessities for her children, Plaintiffs Yvonne Hall and Howard Hall, who would be subjected to unwarranted hardship.

FIRST CLAIM FOR RELIEF

Denial of a Free Public Education Under the North Dakota Constitution

26.

Article 8, Section 2 of the North Dakota Constitution requires the establishment of "...a uniform system of free public schools throughout the state."

27.

Sections 15-34-2-01 and 15-34.2-06.1, N.D.C.C. as implemented through the busing policy of the Dickinson Public Schools, violate Article 8, Section 2 of the North Dakota Constitution because access to public schools is a fundamental part of a free public school system. Allowing provision of access to public schools to be optional, and further allowing fees to be charged for the provision of such access is not consistent with the concept of free public schools.

28.

The busing policy of the Dickinson Public Schools forces low income parents such as Plaintiffs to pay a busing fee they cannot afford, or face criminal prosecution under N.D.C.C. 15-34.1-04 (compulsory school attendance) for failure to send their children to school. Placing low income parents in such a dilemma is also inconsistent with the concept of free public schools; thus the busing policy of Dickinson Public Schools violates Article 8, Section 2 of the North Dakota Constitution.

29.

The busing policy of the Dickinson Public Schools also serves to deprive Plaintiffs Colton, Yvonne Hall, and Howard Hall of access to public schools, which is a further violation of Article 8, Section 2 of the North Dakota Constitution.

SECOND CLAIM FOR RELIEF

Denial of Equal Protection under the North Dakota Constitution

30.

Each factual allegation is realleged and incorporated in this claim for relief.

31.

Article 1, Section 22 of the North Dakota Constitution provides that "[a]ll laws of a general nature shall have a uniform operation."

32.

The Dickinson Public Schools, in its schedule of fees in

Exhibit 1, charges all parents or guardians of children the same amount to bus their children, regardless of the parents' or guardians' income or ability to pay.

33.

The Dickinson Public Schools, through its busing policy, does not provide for a graduated fee schedule based upon income, nor does it provide for waiver of busing fees to people who cannot afford to pay the fee without undue hardship.

34.

Section 15-34.2-06.1, N.D.C.C., as implemented through the busing policy of the Dickinson Public Schools, does not apply uniformly to all citizens, particularly the Plaintiffs, Paula Kadrmas and Marsha Hall. Children, such as Plaintiffs Sarita Colton, Yvonne Hall, and Howard Hall, are denied bus transportation provided to children with wealthier parents.

35.

The busing policy of the Dickinson Public Schools creates a hardship for those of limited means, such as the Plaintiffs, which is not created for those who can afford to pay the busing fee. The policy does not apply uniformly to all persons because those such as the Plaintiffs would have to pay the fee out of money needed to provide other basic necessities of life for them and their children, whereas for parents of greater means, no other necessities of life would be threatened. Furthermore, parents of greater means are not confronted with the dilemma of

paying the busing fee or facing criminal prosecution, as are low income parents such as the Plaintiffs.

THIRD CLAIM FOR RELIEF

Denial of Equal Protection Under the United States
Constitution

36.

Each factual allegation is realleged and incorporated in this Claim for relief.

37.

Based upon the allegations contained in the Second Claim For Relief, the busing policy of Dickinson Public Schools violates the 14th Amendment to the United States Constitution, which provides, in pertinent part "...no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

38.

By enforcing the busing policy without provision for a waiver or a graduated fee scale, the Dickinson Public Schools does not apply 15-34.2-06.1, N.D.C.C., with equal effects upon the Plaintiffs or others of similar, limited means.

WHEREFORE, the Plaintiffs request the following relief:

1. An Order of this Court declaring Section 15-34.2-06.1,

N.D.C.C. unconstitutional in violation of Article 8, Section 2 of the North Dakota Constitution.

2. An Order of this Court declaring Section 15-34.2-01, N.D.C.C. unconstitutional in violation of Article 8, Section 2 of the North Dakota Constitution.

3. An Order of this Court declaring Sec. 15-34.2-06.1, N.D.C.C. unconstitutional, in violation of Article 1, Section 22 of the North Dakota Constitution.

4. An Order of this Court declaring Section 15-34.2-06.1, N.D.C.C. in violation of the 14th Amendment to the United States Constitution.

5. An Order of this Court declaring the busing policy of the Dickinson Public Schools to be in violation of Article 8, Section 2 of the North Dakota Constitution.

6. An Order of this Court declaring the busing policy of the Dickinson Public Schools to be in violation of Article 1, Section 22 of the North Dakota Constitution.

7. An Order of this Court declaring the busing policy of the Dickinson Public Schools to be in violation of the 14th Amendment to the United States Constitution.

8. An Order of this Court permanently enjoining the Dickinson Public Schools from enforcing its busing policy and from collecting any fee for transportation of children to schools.

9. An Order of this Court permanently enjoining the

Dickinson Public Schools from refusing to transport the Plaintiffs' children to and from its schools without charge to the Plaintiffs.

10. For such other and further relief as the Court may deem just and equitable.

Dated this 13th day of December, 1985.

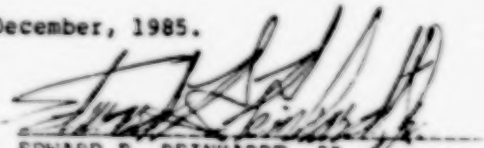

EDWARD B. REINHARDT, JR.
JAMES P. FITZSIMMONS
NORTH DAKOTA LEGAL SERVICES, INC.
P.O. Box 217
New Town, North Dakota 58763

EXHIBIT 1

DICKINSON PUBLIC SCHOOLS
TRANSPORTATION AGREEMENT

This form represents a legal and binding contract between the Dickinson Public School District #1 and the party whose signature appears below.

The School District will provide bus transportation for school-aged children from their residence to school and return or as agreed upon. The bus fee will apply to all children bused, public or parochial. The bus fee is due and payable at registration time unless prior arrangements are approved through the administration office. Board policy on busing will apply to all families. Signed forms must be returned to Dickinson Public Schools by August 9, 1986 at P.O. Box 1057, Dickinson, North Dakota, 58601-1057.

I fully understand this Agreement and do hereby agree to the busing fee as follows:

One child	\$97.00
Two children	\$150.00
Three children	\$205.00
Four children	\$260.00
Five children or more	\$315.00

This fee is for the entire school year. One-way rides (a.m. or p.m.) will be one-half of the fee shown. Kindergarten fees will be one-half of the fee shown.

I will have _____ children on the school bus for the 1985-86 school term. I agree to pay the bus fee as applicable. (Please fill in the number of children to be bused and busing schedule which applies).

My child/children will ride _____ a.m. and p.m.; _____ just a.m.; or _____ just p.m.

Please note on the form if you will have Kindergarten child/children riding on the school bus.

Kindergarten? _____ Yes or _____ No

(Signature)

Please note: THIS FORM MUST BE RETURNED BEFORE BUS SERVICE WILL BE PROVIDED.

EXHIBIT 2

15-34.2-01. Vehicular transportation or lodging may be furnished at option of school board. The school board of any school district in the state, in its discretion, may furnish to each family living in the district:

1. Vehicular transportation; or
2. The equivalent of the payments specified in section 15-34.2-03 in lodging at some other public school if the same is acceptable to the family.

The board shall not accord the benefits of either subsection 1 or subsection 2 to any family which is receiving payments under section 15-34.2-03. In the event any school board elects to furnish vehicular transportation by public conveyance, the distance that each student must reside from his school in order to be entitled to such transportation may be determined by the school board in each district, but all students in the district shall be treated on the same basis in accordance with such determination. The furnishing of benefits under this chapter may be extended to families living in the district for the purpose of transporting students to another school district or county agricultural and training school within the state, or another school district outside the state, if the attendance of such students in the other districts is in accordance with the provisions of this title governing the same.

EXHIBIT 3

15-34.2-06.1. Charge for bus transportation optional. The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. For schoolbus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the state average cost for transportation or the local school district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceding school year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

15-27.3-10. **Transportation required.** A reorganization proposal must provide for the transportation of students and must specify if family-type or public schoolbus-type of transportation shall be used, and if the proposal is approved by the voters of the new district, then the school board of the district shall provide adequate and practical transportation of the type specified, except that if family type transportation is specified, the school board may later substitute public schoolbus-type transportation. A reorganized school district is not bound by the schedule of payments or limitations provided in section 15-34.2-03, and shall establish a schedule of transportation payments as is proper under the circumstances affecting that district, but the newly established schedule of payments may not be less than the amounts specified in section 15-34.2-03 for family-type transportation.

15-34.2-01. **Vehicular transportation or lodging may be furnished at option of school board.** The school board of any school district in the state, in its discretion, may furnish to each family living in the district:

1. Vehicular transportation; or
2. The equivalent of the payments specified in section 15-34.2-03 in lodging at some other public school if the same is acceptable to the family. The board shall not accord the benefits of either subsection 1 or subsection 2 to any family which is receiving payments under section 15-34.2-03. In the event any school board elects to furnish vehicular transportation by public conveyance, the distance that each student must reside from his school in order to be entitled to such transportation may be determined by the school board in each district, but all students in the district shall be treated on the same basis in accordance with such determination. The furnishing of benefits under this chapter may be extended to families living in the district or county agricultural and training school within the state, or another school district outside the state, if the attendance of such students in the other districts is in accordance with the provisions of this title governing the same.

MOTION

ORIGINAL

No. 86-7113

Supreme Court, U.S.
FILED

JUL 22 1987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor by her
next friend, Paula Kadrmass, Appellants,

v.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his
capacity as Superintendent of the Dickinson Public Schools;
CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD
FRIEG, HERB HERAUF, in their capacity as members of the
Dickinson School Board; RICHARD RYKOWSKY, in his capacity
as Transportation Supervisor of the Dickinson Public
Schools, Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

MOTION TO DISMISS

GEORGE T. DYNES
Freed, Dynes, Reichert & Buresh, P.C.
34 East First Street, P.O. Drawer K
Dickinson, North Dakota 58602-8305
(701) 225-6711
Counsel for Appellees

July 17, 1987

<u>TABLE OF CONTENTS</u>	
BASIS FOR MOTION TO DISMISS UNDER RULE 16	1
ISSUES:	
I. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.	1
II. THE JUDGMENT RENDERED BY THE NORTH DAKOTA SUPREME COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS	4
CONCLUSION.	5

<u>TABLE OF AUTHORITIES</u>	
Cases:	
<u>Kadrmas v. Dickinson Public Schools,</u> 402 N.W.2d 897 (ND 1987).	2, 4
<u>Lanza v. Wagner,</u> 83 S.Ct. 177 (1962)	3
<u>Plyler v. Doe,</u> 102 S.Ct. 2382 (1982)	4
<u>Quong Ham Wah Company v. Industrial Accident Commission of California,</u> 41 S.Ct. 373 (1921).	2
<u>San Antonio Independent School District v. Rodriguez,</u> 93 S.Ct. 1278 (1973).	2, 3
<u>State v. Sims,</u> 71 S.Ct. 557 (1950)	2
Statutes:	
North Dakota Century Code: 15-34.2-06.1	1, 2
Other:	
Rule 16, Rules of the Supreme Court of the United States .	1

<u>BASIS FOR MOTION TO DISMISS UNDER RULE 16</u>	
I. The appeal does not present a substantial federal question.	
II. The judgment rendered by the North Dakota Supreme Court rests on an adequate non-federal basis.	

Rule 16.1(b) of the Rules of the Supreme Court of the United States states:

"The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis."

The Appellees contend that there is not a substantial federal question presented by the appeal. We also contend that the judgment of the North Dakota Supreme Court rests on an adequate non-federal basis.

I. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Appellants' main contention is that Section 15-34.2-06.1 of the North Dakota Century Code is unconstitutional because it discriminates on the basis of wealth. They are now asking this Court to accept an appeal based on their claim that the North Dakota Supreme Court was incorrect when it upheld the constitutionality of Section 15-34.2-06.1. NDCC, under the "rational basis" test.

The Appellees contend that the question presented was primarily a state question to be answered by the North Dakota Supreme Court. That Court decided in favor of the Appellees and upheld the statute, which permits the charging of nominal fees to those receiving bus transportation to public schools.

The North Dakota Supreme Court found that Article VIII, Section 2, of the North Dakota Constitution does not require transportation for students. Article VIII, Section 2, of the North Dakota Constitution states:

"The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education." (Emphasis added).

The North Dakota Supreme Court expressly decided that Section 15-34.2-06.1, NDCC, was constitutional under Article VIII, Section 2, of the North Dakota Constitution. Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897 (ND 1987). Its rationale was that the term "free public schools" does not mean that any expense related to a child's transportation to school must also be free.

The North Dakota Supreme Court should be the final arbiter, for state purposes, as to whether a statute is constitutional. Quong Ham Wah Company v. Industrial Accident Commission of California, 41 S.Ct. 373 (1921); State v. Sims, 71 S.Ct. 557 (1950).

The North Dakota Supreme Court has decided that free transportation to and from schools is not a right inherent in the North Dakota State Constitution although that constitution does not mandate free schools. On the other hand, the United States Supreme Court decided in the case of San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278 (1973), that education is not a fundamental right guaranteed by the United States Constitution. Because the United States Constitution does not recognize a fundamental right to education, and the North Dakota Supreme Court recognizes only the right to free public schools, not free transportation to those schools, the Appellants are seeking

to have a right given to them which does not exist in either the North Dakota State Constitution or the United States Constitution.

The Appellants seek the right to free transportation to public schools because they are not wealthy, but as this Court said in the San Antonio Independent School District case:

"... At least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." Id. at 1291.

The Appellants have never been denied access to the public school system. Testimony revealed that no one was ever denied transportation on the bus system if they made prior arrangements with the school district. What is even more ironic is the fact that the children did attend school and were driven there on a daily basis at much greater expense than the cost of the busing fee.

The main point is that there is no substantial federal question presented here. The North Dakota Supreme Court decided the case based on North Dakota law and the North Dakota State Constitution. In the case of Lanza v. Wagner, 83 S.Ct. 177 (1962), this Court decided that there was no substantial federal question involving an appeal on constitutional grounds by the incumbent members of a city board of education when their terms of office were terminated by statute. The constitutionality of the statute was upheld by the state court of last resort and this Court refused to hear the appeal. In the case at bar, the North Dakota Supreme Court has decided that the statutes in question are constitutional. The remaining question is then whether there is some violation of the United States Constitution. Because the United States Constitution does not have contained in it a right to an education, there cannot be by implication a right to free transportation to school.

Therefore, the appeal should fail for lack of a substantial federal question.

II. THE JUDGMENT RENDERED BY THE NORTH DAKOTA SUPREME COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The North Dakota Supreme Court reviewed the Appellants' arguments that wealth, or the lack thereof, is a classification subject to an intermediate level of scrutiny. In its opinion, the North Dakota Supreme Court states:

"In our view the challenged statute in this case is purely economic legislation which neither involves a suspect classification nor a fundamental or important substantive right which would require the strict scrutiny or intermediate standard of review. In similar equal protection challenges to legislation involving student transportation the traditional rational basis standard of review has been employed. (Citations omitted). We conclude that the rational basis test is the appropriate standard of review for the plaintiffs' equal protection claims in this case." Kadmas v. Dickinson Public Schools, 402 N.W.2d 897, 902 (ND 1987).

Additionally, this Court stated in the case of Plyler v. Doe, 102 S.Ct. 2382 (1982):

"A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." Id. at 2394.

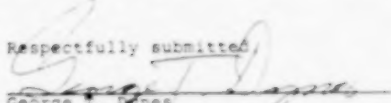
The North Dakota Supreme Court looked to both its own state law and other state laws and decisions from other jurisdictions, including this Court, in deciding that the rational basis test should be used. Because state laws were used as well as the North Dakota State Constitution, the judgment rendered by the North Dakota Supreme Court rests on an adequate non-federal basis, and should be upheld as such.

CONCLUSION

For these reasons, the Court should dismiss the appeal.

Dated this 17th day of July, 1987, at Dickinson, North Dakota.

Respectfully submitted,


George F. Jones
FREED, DYMES, REICHERT & BURESH, P.C.
34 East First Street, P.O. Drawer K
Dickinson, ND 58602-8305
Counsel for Appellees

COUNTY OF STARK

1

MOTION TO DISMISS

Edward B. Reinhardt, Jr.

Nicholas J. Spaeth

Edward B. Reinhardt, Jr.
North Dakota Legal Servi
Inc.
P.O. Box 217
New Town, ND 58763

Duane Houdek
Legal Assistance of
North Dakota
P.O. Box 1893
Bismarck, ND 58502

and depositing the same, with postage prepaid, in the United States mail at Dickinson, North Dakota.

~~Sanjay Kovash~~

Luella B. Abel, Notary Public
Stark County, North Dakota
My Commission Expires: 7/26/90

(SEAL)

MOTION

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

PAULA KADRMAS, AND SARITA KADRMAS,
BY NEXT FRIEND, PAULA KADRMAS,

APPELLANTS,

-VS-

DICKINSON PUBLIC SCHOOLS, ROSS JULSON
IN HIS CAPACITY AS SUPERINTENDENT OF
THE DICKINSON PUBLIC SCHOOLS, CLARENCE
STORSETH, NANCY JOHNSON, MERRY JOHNSTON
HAROLD KRIEG, HERB HERAUF, IN THEIR
CAPACITY AS MEMBERS OF THE DICKINSON
SCHOOL BOARD; RICHARD RYKOWSKY, IN HIS
CAPACITY AS TRANSPORTATION SUPERVISOR
OF THE DICKINSON PUBLIC SCHOOLS,

APPELLEES.

ON APPEAL FROM THE
SUPREME COURT OF NORTH DAKOTA

MOTION TO DISMISS
BY THE STATE OF NORTH DAKOTA

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: Terry L. Adkins
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	11
STATEMENT OF THE CASE	1
LAW AND ARGUMENT.	3
CONCLUSION.	14

TABLE OF AUTHORITIES

	Page
<u>UNITED STATES SUPREME COURT CASES</u>	
<u>Harris v. McRae</u>	
448 U.S. 297 (1980)	8
<u>Lindsey v. Normet</u>	
455 U.S. 56 (1972).	10
<u>Plyler v. Doe</u>	
457 U.S. 202 (1982)	5, 10, 11
<u>San Antonio Independent School District</u>	
<u>et al v. Rodriguez</u>	
411 U.S. 1 (1973)	4, 5, 6, 7, 8, 9, 11
<u>NORTH DAKOTA SUPREME COURT CASES</u>	
<u>Cardiff v. Bismarck Public School District</u>	
263 N.W.2d 105 (1978)	6, 13
<u>In Interest of G.H.</u>	
218 N.W.2d 441 (N.D. 1974).	6
<u>Kadrmas v. Dickinson Public Schools</u>	
402 N.W.2d 897 (1987)	7, 12
<u>STATUTES</u>	
N.D. Const. art VIII, § 2.	7
N.D.C.C. § 15-27.3-10.	12
N.D.C.C. § 15-34.2-01.	3
N.D.C.C. § 15-34.2-06.1.	13, 6, 14

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PAULA KADRMAS, AND SARITA KADRMAS,
BY NEXT FRIEND, PAULA KADRMAS,

APPELLANTS,

-VS-

DICKINSON PUBLIC SCHOOLS, ROSS JULSON
IN HIS CAPACITY AS SUPERINTENDENT OF
THE DICKINSON PUBLIC SCHOOLS, CLARENCE
STORSETH, NANCY JOHNSON, MERRY JOHNSTON
HAROLD KRIEG, HERB HERAUF, IN THEIR
CAPACITY AS MEMBERS OF THE DICKINSON
SCHOOL BOARD; RICHARD RYKOWSKY, IN HIS
CAPACITY AS TRANSPORTATION SUPERVISOR
OF THE DICKINSON PUBLIC SCHOOLS,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

MOTION TO DISMISS BY THE STATE OF NORTH DAKOTA

STATEMENT OF THE CASE

Appellants Paula Kadmas, and Sarita Kadmas, by next friend, Paula Kadmas, are residents of the town of New Hradec, North Dakota, located approximately 10 miles north of Dickinson, North Dakota. This controversy centers around the appellants' attempt to gain declaratory and injunctive relief prohibiting the Dickinson Public Schools from charging them fees for busing Sarita Kadmas to the Dickinson schools.

North Dakota law authorizes school districts that have not been reorganized to charge parents a fee for schoolbus service. N.D.C.C. § 15-34.2-06.1. The law further provides that the collected busing fees, when added to moneys the school district received from the state for such transportation service, may not exceed the school district's actual busing costs. *Id.*

The Dickinson Public School District, a school district that has not been reorganized, operates an optional bus system, providing door-to-door transportation to the Dickinson schools for those students whose parents have signed agreements to pay the busing fees established for the school year by the School District.

As the trial court found in this case, the total busing fees at issue here compensated the Dickinson Public School District for only a small part of its actual cost of transporting the District's students. For example, of the \$312,147.00 busing expense of the District for the 1984-85 school year, approximately \$244,000.00 was paid to the District by the state of North Dakota, approximately \$34,000.00 was paid out of local property taxes, and only the remainder (about \$34,000.00) was collected through the busing fees. Families in the Dickinson Public School District desiring transportation for one child were asked to pay \$97.00 for the bus service for the school year in question here.

As part of this fee system, the Dickinson Public School District requires parents who wish to take advantage of its busing service to sign an agreement to pay the authorized busing fees.

The appellants refused to enter into such an agreement with the District for the 1985-86 school year. Instead, since the beginning of that school year, the appellants have chosen to transport Sarita Kadmas to school through private means, at a cost to the appellants that greatly exceeded the \$97.00 bus fee charged by the Dickinson Public School District. Paula Kadmas claimed her monthly expenses for transporting Sarita to school were \$114.00 per month totalling \$1,026.00 annually.

The appellants brought this action in North Dakota District Court, at the Southwest Judicial District, seeking declaratory and injunctive relief to prevent the Dickinson Public Schools from charging fees to parents living in rural areas for busing their children to school. They further sought to have N.D.C.C. § 15-34.2-06.1 declared unconstitutional based on both state and federal grounds. After a trial, the North Dakota state district court dismissed the appellants' complaint, and that dismissal was

upheld by the North Dakota Supreme Court in a decision dated March 26, 1987.

The appellants have now filed an appeal to this Court from the North Dakota Supreme Court's decision. This appeal should be dismissed pursuant to Supreme Court Rule 16.1(b) on the ground that it does not present a substantial federal question, as established law clearly demonstrates that the appellants' claim of a constitutional violation is entirely without merit.

Pursuant to 28 U.S.C. § 2403(b), the Office of Attorney General appears here on behalf of the state of North Dakota and exercises the rights of a party, as this proceeding challenges the constitutionality of state statute affecting the public interest.

LAW AND ARGUMENT

In their state court action and in this resulting appeal, the appellants have challenged the constitutionality of N.D.C.C. § 15-34.2-06.1, the state statute that authorizes the busing policy followed by the Dickinson Public School District. N.D.C.C. § 15-34.2-06.1 states, in relevant part:

The school board of any school district which has not reorganized . . . may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district.

Further authority for the school busing plan utilized in Dickinson, North Dakota, is found at N.D.C.C. § 15-34.2-01 which provides:

15-34.2-01. VEHICULAR TRANSPORTATION OR LODGING MAY BE FURNISHED AT OPTION OF SCHOOL BOARD. The school board of any school district in the state, in its discretion, may furnish to each family living in the district:

1. Vehicular transportation; . . .

. . . In the event any school board elects to furnish vehicular transportation by public conveyance, the distance that each student must reside from his school in order to be entitled to such transportation may be determined by the school board in each district, but all students in the district shall be treated on the same basis in accordance with such determination.

The appellants claim that these statutes and the Dickinson busing policy violate the equal protection clause of the fourteenth amendment to the United States Constitution. However,

previous decisions of this court demonstrate that there has been no such constitutional violation.

In San Antonio Independent School District et al. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court considered and rejected a similar equal protection argument. The appellants in Rodriguez argued that the Texas legislation governing public school financing violated the equal protection clause because school children residing in districts having a low property tax base were discriminated against in the quality of their education as opposed to students in more affluent districts, where differences in the value of assessable property made a more expensive education possible. Id. at 16. The Supreme Court held that there was no equal protection violation. Id. at 4.

In its analysis, the Court stated that first it had to be determined whether the Texas statutory scheme operated to the disadvantage of a suspect class or impinged upon a fundamental right explicitly or implicitly protected by the constitution, thereby requiring strict judicial scrutiny. Id. at 17. The Court found neither a suspect class nor a fundamental right at stake in that case. Id. at 16.

The Court stated although education is recognized to be an important function of state and local governments, the Court simply has refused to "create" a fundamental right to education. Rodriguez, 411 U.S. at 33. Expressing a distaste for weighing the importance of education versus other public rights in determining an equal protection analysis, the Court stated: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." Id. This Court then stated that education is not among the rights afforded explicit protection under the federal constitution, and declined to find any basis for saying it is implicitly so protected. Id. at 35. Noting an historic dedication to public education, the Court declined to allow the importance of a service performed by the state to determine whether that service must be regarded as fundamental for purposes of examination under the

equal protection clause. Id. at 30. In fact, the Rodriguez Court went on to state that if the degree of judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected in each case, the court would have gone far toward acting as a super legislature. Id. at 31 (quoting Shapiro v. Thompson, 394 U.S. 618, 661 (1969)). Thus, failing to find an explicit constitutional right to education, this Court has refused to create one. Rodriguez, 411 U.S. at 39.

Even in the case Plyler v. Doe, 457 U.S. 202, 221 (1982), relied upon by the appellants, the Supreme Court expressly held that "[p]ublic education is not a 'right' granted to individuals by the Constitution." Although the children of illegal Mexican immigrants were being refused an education by the state of Texas, the Court would not find that public education is a right granted by the United States Constitution. Plyler v. Doe, 457 U.S. at 221. Although the Court was tempted to apply a higher standard of review to this equal protection claim because of lack of recourse for the children, the Court still based the analysis on the fact that public education is not a fundamental right granted by the Constitution. Id.

The Court in the Plyler case did overturn the statute preventing illegal alien children from attending Texas schools, but the rationale was based on the permanency of the disability. Id. at 223. The court stated that a lifetime of hardship on a discrete class of children who were not accountable for the disabling status would result from implementation of the Texas statute. Id.

Even if great weight is given the right to obtain a free public education, there is absolutely no evidence that the North Dakota statute being challenged deprived a child of the right to a public education. As in Rodriguez, the system implemented by the state did not result in an absolute denial of educational opportunities to any of its children. The Rodriguez court stated that the argument raised provides no basis for finding an interference with fundamental rights where no charge could be made that

the system fails to provide each child with an opportunity to acquire basic minimum skills. Id. The argument that an equal protection violation exists in the North Dakota statute is especially and unpersuasive where parents are not asked to bear the full cost of transporting their children to school, but only a portion of the balance of the cost after state foundation transportation payments are made. In fact, in the case at bar, it was shown that the children did not fail to attend school. The testimony indicated that the Kadrmas family drove their child to school, choosing to incur a transportation cost much greater than the cost that would have been borne by the family had they chosen to pay the school busing fee. As in Rodriguez, where this Court did not find the Texas statute denied the children an education, the North Dakota statute does not deny access to an education.

ACCESS TO EDUCATION IN THE FORM OF
TRANSPORTATION IS NOT PART OF THE RIGHT
TO A FREE PUBLIC EDUCATION

While education is not a fundamental right by interpretation of the federal Constitution, it has been found to be a fundamental right under the North Dakota State Constitution. In Interest of G.H., 218 N.W.2d 441 (N.D. (1974)). The North Dakota Supreme Court has held that the North Dakota state constitution contemplates the right to a free public education, although that court has also held that the state should control what is included in that right. Following a thorough analysis of the legislative history of N.D.C.C. § 15-34.2-06.1, the North Dakota Supreme Court then determined that there was no legislative intent to include transportation in the free public education provided by the constitution.

The North Dakota constitutional provision that the Legislative Assembly shall provide for a uniform system of free public schools throughout the state has been interpreted to mean that the term "free public schools," without modification, means and includes those articles essential to education. Cardiff v. Bismarck Public School District, 263 N.W.2d 108, 113 (1978).

The North Dakota Supreme Court in its prior review of the

Kadmas case. Kadmas v. Dickinson Public Schools, 402 N.W.2d 897 (1987), now being considered by this Court, did an exhaustive review of the history of the provision of transportation by public schools in North Dakota. The North Dakota court noted that the original constitutional language mandating "uniform system of free public schools" was accompanied by no statutory provision requiring or authorizing districts to provide transportation. Kadmas, 402 N.W.2d at 899. The Legislature has never required that the school district assume entire responsibility for the cost of transporting students. Id. at 900.

Therefore, the North Dakota Supreme Court does not deem transportation to be a part of the public school system. Id. And the North Dakota court held that N.D. Const. art. VIII, § 2 does not require the state or school districts to provide free transportation to children to and from school. Id. at 902.

Consequently, because the North Dakota court has evaluated the intent of the North Dakota Legislature in drafting statutes that deal with the cost of transportation, that decision should not be disturbed by this court. Having found a fundamental right to education in the North Dakota constitution, that court should be allowed to interpret what the parameters of that education include.

WEALTH IS NOT A SUSPECT CLASS

The North Dakota statutes permitting non-reorganized school districts to charge a fee for transportation of students will be reviewed in an equal protection challenge to determine whether there is a rational basis for the state to treat classes of persons differently, unless there is the presence of a suspect class to trigger an elevated standard of scrutiny by this court.

The leading case in which there was an equal protection challenge to a statute bearing on education is San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). This Court in the Rodriguez case looked to the framework of prior cases to determine the parameters of a suspect classification which triggers elevated scrutiny. The Court reviewed the traditional

indicia of suspectness including whether the classification is traditionally saddled with disabilities; whether the group has been subjected to a history of unequal treatment; or whether the classification has been relegated to a position of political powerlessness. Rodriguez, 411 U.S. at 28. This Court has never held that financial need alone identifies a suspect class for equal protection analysis. Harris v. McRae, 448 U.S. 297, 323 (1980). Only if those traditional indicia of suspectness are present will this Court invoke the extraordinary protection of the majoritarian political process. Rodriguez, 411 U.S. at 28.

The classes being analyzed for purposes of an equal protection claim in the case at bar are not traditional classifications that trigger a suspect standard of analysis. The statute in effect in the state of North Dakota provides that non-reorganized school districts may charge a fee for the use of busing services by their patrons. Dickinson Public School District has applied that fee and offered bus services to any patron of the school living three miles or more from the school. To determine whether those two types of classification, non-reorganized districts or patrons living a certain distance from the community, constitute a suspect classification for purposes of equal protection analysis, the classes must be analyzed in terms of the deprivation caused the individuals affected by the statute.

The Court noted that prior cases involving "wealth" classifications concerned poor persons who were completely unable to pay for a desired benefit, and consequently suffered absolute deprivation of a meaningful opportunity to enjoy the benefit because of the "wealth" classification. Rodriguez, 411 U.S. at 20. For example, the Court reviewed cases in which indigents were unable to gain access to the judicial system. Id. It is important to note that the Court in Rodriguez pointed out that the supreme court does not give relief in cases where burdens to indigents are relatively greater, but not insurmountable, than those burdens on other persons. Id.

The Rodriguez court specifically stated that this Court has not held that fees should be structured to reflect each person's ability to pay in order to avoid inappropriate burdens. In each case, the Rodriguez court noted the factor causing the court to find an equal protection violation was a total deprivation of the meaningful opportunity to gain some desired benefit. Id. at 24.

In the case at bar, it has not been shown that the lack of personal resources has occasioned absolute deprivation of the desired benefit.

Indeed, it is undisputed that Sarita Kadrmas continued to attend school. There has been no absolute deprivation of the benefit of education. The Rodriguez court went on to state that the equal protection clause does not require absolute equality of precisely equal advantages. Id. at 24. In fact, Rodriguez stated that in view of the infinite variables affecting the education process, no system can assure equal quality of education except in a relative sense. Id. It is true that students living more than three miles away from Dickinson were required by the public school system to pay a fee to use the transportation services offered by the school district. However, the students were not foreclosed from the opportunity of gaining an education by the fees assessed by the Dickinson School District. This Court has held that there is no requirement that fees should be structured to reflect each person's ability to pay in order to avoid inappropriate burdens, and has further held that only an absolute deprivation of a meaningful opportunity gives rise to the indication of a suspect classification. Id. at 22.

In this case, the petitioners were not only given the opportunity to attend school every day by utilizing the transportation services offered by the Dickinson district, but they were given the opportunity to gain access to school at a discount price. Although the petitioners live 16 miles from Dickinson, they were not charged a fee that reflected the distance that the bus had to travel in order to transport the children to

and from school. Instead, they and all the other patrons interested in utilizing the bus services were asked to share the balance of the cost to operate the bus above what portion was paid by the state of North Dakota. By arranging such a system, the Dickinson School District indicated a desire to provide transportation to all students on a completely equitable basis, and in fact it did operate in an equitable fashion as is shown by the fact that the petitioners had to pay a great deal more to utilize private transportation than they would have paid to use the Dickinson bus service.

States have traditionally been permitted by this Court to utilize legislation that incidentally creates classifications. In Flyler v. Doe, the court discussed a statute which created a classification that was later challenged. This court stated that a legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate public and private concerns, and that account for limitations on the practical ability of this state to remedy every ill. Flyler, 457 U.S. at 216. And in fact, in Lindsey v. Normet, 405 U.S. 56 (1972), this Court upheld an Oregon statute in the face of an equal protection challenge although the statute expedited judicial action relative to eviction for tenants who defaulted in payments on rental property. This Court stated that classifying tenants for the purposes of possessory action offends equal protection only if "the classification rests on grounds wholly irrelevant to achievement of the state's objectives." Id. at 70. (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)). In the Oregon case this Court found that the prompt and peaceful resolution of disputes of possession of real property is a legitimate end sought by the Oregon statute, and that the statute operated to achieve the state's objectives. Lindsey, 405 U.S. at 70.

In light of the fact that this Court has repeatedly held that poverty, standing alone, is not a suspect class, the clas-

sification being challenged in the case at bar should be reviewed on a rational basis. Because this court had held in the Plyler case that state legislatures must have latitude to establish classifications that accommodate public and private concerns, it is evident that the North Dakota Legislature was attempting to meet that criteria when it passed the statute allowing school districts to charge a fee for bus services. The North Dakota statute has been designed simply to aid districts in gaining the funds for transportation services which cannot be provided completely by the state. Although the state does provide transportation funding for school districts, it has not been possible for this state to completely cover the cost of transportation. Thus, the state does allow these districts to divide the cost of transportation that is not covered by state foundation aid among the patrons utilizing the service. In this fashion, the state is able to operate in an economical fashion, while the portion of services which the state is not able to fund is divided among those persons who will utilize the service. Consequently, the busing services are not directly supported by the majority of patrons who do not have the need to utilize the service.

A RATIONAL BASIS EXISTS FOR THE
STATUTORY CLASSIFICATIONS CREATED
BY THE NORTH DAKOTA LEGISLATURE

The constitutional standard under the equal protection clause to be evaluated when a state legislature has created a classification is whether the challenge to state action rationally furthers a legitimate state purpose or interest. Rodriguez, 411 U.S. at 55 (quoting McGinnis v. Royster, 410 U.S. 263, 270 (1973)). Abundant bases exist which demonstrate that the state of North Dakota had a rational objective in creating the statutory standards here being challenged.

The challenged statute provides that reorganized school districts will provide bus transportation for students within a district while non-reorganized districts have no such comparable

requirement. The state legislature of North Dakota mandated bus transportation be provided to reorganized districts because of a desire to treat fairly those who were the patrons involved in the reorganization plan. N.D.C.C. § 15-27.3-10 states that transportation must be provided for students and the school board is responsible to provide that transportation. The Legislature had a twofold purpose in providing such a requirement. One, the Legislature had an interest in encouraging the school districts to reorganize because of decreased tax bases and pupil population throughout the state. Once districts are reorganized, more taxable land area is included in each district making a stronger and more fiscally sound school district. The second objective of the Legislature in requiring busing was to provide incentive for reorganization, and to alleviate parental concern. The reorganization plans frequently call for children to be moved from a local neighborhood school to a school more centrally located for the whole group of children. The new "central" school may be quite a distance from the child's home. This concern was recognized by the North Dakota Supreme Court, which stated in the Kadrmas case at the state level: "North Dakota must encourage reorganization to foster tax base expansion and more effective school systems." Kadrmas, 402 N.W.2d at 903.

Another legislative objective was recognized by the North Dakota Supreme Court in upholding the challenged statute. The state of North Dakota itself experiences fiscal limitations, as well as does each individual school district. The North Dakota Supreme Court upheld the reorganization plan, including the transportation provision, stating that "allocation of a school district's limited funds to education-related matters other than transportation is not irrational." Id. at 903 (quoting Sutton v. Cadillac Area Public Schools, 323 N.W.2d 582, 585 (1982)).

Further, the provision of free transportation to each school child simply is not an integral part of a free public education. North Dakota case law has interpreted the North Dakota con-

stitutional provision that a free public education will be provided. In Cardiff v. Bismarck Public Schools, for example, a challenge was raised against the policy of the school district of charging a rental fee for text books. See Cardiff v. Bismarck Public School District, 263 N.W.2d 105, 106 (1978). The court stated: "the term 'free public schools' without any other modification must necessarily mean and include those items which are essential to education." Id. at 113. The court then went on to find that textbooks are essential to education, and struck down the school district policy of charging for the use of textbooks. However, the North Dakota Supreme Court has specifically found that transportation is not on a par with textbooks in terms of being essential to the provision of public school education. The court stated that the laws of North Dakota clearly demonstrate that the Legislature has never required that the state or school district assume the entire responsibility or cost of transporting students. Id. at 900. The court stated:

We believe the long-standing legislative practice of making student transportation a shared responsibility between school districts and parents provide some indication that the constitutional requirement of a "uniform system of free public schools" does not mandate free student transportation.

Id.

The reorganization plan implemented in North Dakota is designed to attract patrons to the idea of reorganizing, which is done on a voluntary basis, and to provide equitable treatment for those families whose children are being sent to schools at some distance from their home. The legislative objective is to encourage patrons to reorganize troubled districts, and thus to foster tax base expansion and a more effective school system. Further, the statutory provision that districts may charge patrons for a portion of busing costs not paid by the state transportation program is a policy adopted by the Legislature for the objective of allocating limited resources of the state. Finally, transportation is simply not viewed as an essential part of a free public education, required by the constitution of the state of

North Dakota. Taken together, these bases provide an abundant rationale for the legislative provision here being challenged.

Utilizing a rational basis of review, N.D.C.C. § 15-34.2-06.1 is supported by abundant rationale, and should not fall to an equal protection claim.

CONCLUSION

A statutory scheme under which a school district offers to provide student transportation at considerably less expense to the parents than self-transportation would entail does not constitute a deprivation which offends federal equal protection rights. The system of North Dakota schools which allows districts to charge parents for a small portion of the transportation fee incurred by the school does not deprive the petitioners of the right to attend school and does not disadvantage or excessively burden them in terms of the cost of transportation.

The established constitutional principles previously set forth by this Court show that there has been no equal protection violation here and that this appeal does not present a substantial federal question.

Therefore, the respondents respectfully request that this court dismiss this appeal and allow the North Dakota statute here being scrutinized to stand.

Respectfully submitted this 21st day of July, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: Terry L. Adkins
Terry L. Adkins
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, ND 58505

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PAULA KADRMAS, AND SARITA KADRMAS,
BY NEXT FRIEND, PAULA KADRMAS,

APPELLANTS,

-VS-

DICKINSON PUBLIC SCHOOLS, ROSS JULSON
IN HIS CAPACITY AS SUPERINTENDENT OF
THE DICKINSON PUBLIC SCHOOLS, CLARENCE
STORSETH, NANCY JOHNSON, MERRY JOHNSTON
HAROLD KRIEG, HERB MERAUF, IN THEIR
CAPACITY AS MEMBERS OF THE DICKINSON
SCHOOL BOARD; RICHARD RYKOWSKY, IN HIS
CAPACITY AS TRANSPORTATION SUPERVISOR
OF THE DICKINSON PUBLIC SCHOOLS,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Connie Visto, being first duly sworn, deposes and says that
on the 21st day of July, 1987, she served the attached MOTION TO
DISMISS upon Duane Houdek and George T. Dynes, by placing a true
and correct copy thereof in envelopes addressed as follows:

Mr. Duane Houdek
Legal Assistance of North Dakota
P.O. Box 1893
Bismarck, ND 58502-1893

Mr. George T. Dynes
Attorney at Law
Drawer K
Dickinson, ND 58602

and depositing the same, with postage prepaid, in the United
States mail at Bismarck, North Dakota.

Connie Visto
Connie Visto

Subscribed and sworn to before me
this 21st day of July, 1987.

Ernest E. Gray
NOTARY PUBLIC

MY TERM EXPIRES
ON 12/31/88
NOTARY STATE OF NORTH DAKOTA

JOINT APPENDIX

NOV 10 1987

JOSEPH F. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor by her
next friend, PAULA KADRMAS,

v. *Appellants,*

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his capacity as Superintendent of the Dickinson Public Schools; CLARENCE STROSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD KRIEG, HERB HERAUF, in their capacity as members of the Dickinson School Board; RICHARD RYKOWSKY, in his capacity as Transportation Supervisor of the Dickinson Public Schools,

Appellee.

On Appeal from the Supreme Court of North Dakota

JOINT APPENDIX

EDWARD B. REINHARDT, JR.*
North Dakota Legal Services, Inc.
PO Box 217
New Town, North Dakota 58763
(701) 627-4719

DUANE HOUDEK
Legal Assistance of North Dakota
PO Box 1893
Bismarck, North Dakota 58502
(701) 222-2110

Counsel for Appellants

* Counsel of Record

GEORGE T. DYNES *
FREED, DYNES, REICHERT &
BURESH, P.C.
34 East First Street
PO Box Drawer K
Dickinson, ND 58602-8305
(701) 255-6711
Counsel for Appellees

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries.....	1
Separate Answer of Dickinson Defendants, filed Sept. 23, 1985	3
Plaintiff's Amended Complaint, filed December 16, 1985	6
Plaintiff's Exhibit No. 9—Dickinson Public Schools Transportation Agreement	20
Plaintiff's Exhibit No. 13—Dickinson Public Schools "Information for Parents on School Transportation, 1985-86" booklet, containing school busing policy..	22
Transcript of Proceedings:	
Testimony of Paula Kadrmas, Plaintiff	29
Direct Examination	29
Cross Examination.....	31
Testimony of Richard Rykowski, Defendant.....	33
Direct Examination	33
Cross Examination	33
Memorandum Decision of the trial court, dated April 11, 1986	35
Findings of Fact, Conclusions of Law, and Order for Judgment, dated April 30, 1986	43
Judgment, dated May 6, 1986	50
Opinion of the North Dakota Supreme Court, dated March 26, 1987	53
Notice of Appeal, June 19, 1987	69
Order of the Supreme Court of the United States grant- ing leave to proceed in forma pauperis and noting jurisdiction October 5, 1987	70

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 9, 1985—Plaintiff's original Complaint filed in Stark County District Court.

September 12, 1985—Application for Order to Show Cause Why a Preliminary Injunction Should Not Issue filed by plaintiffs, seeking to have the defendant's show why they should not be required to provide free transportation to plaintiff's children during the pendency of this action.

September 18, 1985—Order to Show Cause entered, requiring defendant's to show why free transportation should not be provided to plaintiff's children.

September 23, 1985—Separate Answer of Dickinson Defendants filed.

September 25, 1985—Answer filed by defendant Wayne Sanstead, North Dakota Superintendent of Public Instruction.

September 25, 1985—Motion to Dismiss filed by defendant Sanstead, seeking his dismissal as a defendant.

November 13, 1985—Order Denying Temporary Injunction entered, denying plaintiff's request for free transportation of their children during the pendency of this action.

November 13, 1985—Order Granting Motion to Dismiss entered granting defendant Sanstead's motion to be dismissed as a defendant.

November 23, 1985—Order of Dismissal entered dismissing Sanstead as a defendant.

December 2, 1985—Motion for Joinder of Additional Plaintiffs and to Amend Complaint filed by plaintiffs, seeking to amend the Complaint to include the plaintiffs' children as additional plaintiffs.

December 16, 1985—Amended Complaint filed by plaintiffs.

April 16, 1986—Memorandum Decision of the trial court entered.

May 5, 1986—Findings of Fact, Conclusions of Law, and Order for Judgment filed.

May 6, 1986—Judgment entered, dismissing plaintiff's Complaint.

May 7, 1986—Notice of Entry of Judgment entered.

May 29, 1986—Notice of Appeal to the North Dakota Supreme Court filed by plaintiffs.

May 1, 1987—Opinion of North Dakota Supreme Court filed with District Court.

May 6, 1987—Final Judgment Pursuant to Supreme Court Mandate entered.

May 13, 1987—Notice of Entry of Final Judgment Pursuant to Supreme Court Mandate entered.

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF STARK

Civil No. 371-CV85

PAULA KADRMAS and MARSHA HALL,
vs. *Plaintiffs,*

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his capacity as Superintendent of the Dickinson Public Schools; CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD KRIEG, HERB HERAUF, in their capacity as members of the Dickinson School Board; RICHARD RYKOWSKY, in his capacity as Transportation Supervisor of the Dickinson Public School; and WAYNE SANSTEAD, in his capacity as Superintendent of Public Instruction,

Defendants.

SEPARATE ANSWER OF DICKINSON DEFENDANTS

COME NOW, the above named Defendants, Dickinson Public Schools, Ross Julson, Clarence Storseth, Nancy Johnson, Merry Johnston, Harold Krieg, Herb Herauf and Richard Rykowski, by and through their attorneys, Freed, Dynes, Reichert & Buresh, P.C., and for their answer to the Complaint in this action, hereby state and allege as follows:

I.

All of the allegations in the Complaint are denied, except those matters which are hereinafter specifically admitted, qualified or explained.

II.

It is admitted that the Dickinson Public Schools charge fees as permitted by Section 15-34.2-06.1, NDCC. The only reason the Plaintiffs' children are not currently riding on the Dickinson school buses is that the Plaintiffs have refused to agree to pay any fee for such transportation as directly authorized by said statute.

III.

The Plaintiff, Paula Kadrmas, is not a resident of the town of New Hradec, but does reside in that vicinity. One of her children is enrolled in Dickinson Public Schools, and for the previous three school years, said child was bused in accordance with the oral agreement between Paula Kadrmas and the School District for the payment of the usual bus fees.

IV.

The Plaintiff, Marsha Hall, has two children attending Dickinson Schools and said children rode the Dickinson school bus for the four academic years prior to the present. That such prior transportation was made in accordance with the normal agreement for the payment of fees. This is the first year in which the Plaintiff Hall has refused to agree to pay any fees for such transportation.

V.

The content of Paragraphs 4, 5, 6 and 7 of the Complaint are admitted.

VI.

Dickinson has a policy of charging fees for busing, which policy was first instituted in the 1973-74 school year. Until this year, no written agreement was required. The policy was changed for the 1985-86 year to require written agreements as alleged in the Complaint. It is acknowledged that the Plaintiffs Kadrmas

and Hall have refused to sign transportation agreements as have been signed by all other parents whose children are participating in the bus system, and because of that refusal, busing services have not been offered to the children of the Plaintiffs for the current school year.

VII.

That the busing policy, including the charging of fees, is in accordance with North Dakota law, in accordance with all constitutional provisions, and is a policy engaged in by numerous large school districts in the State of North Dakota in addition to Dickinson.

VIII.

That the Complaint in this action does not contain a claim for any temporary relief. That there is no ground for granting any injunction under the provisions of Chapter 32-06, NDCC.

WHEREFORE, these answering Defendants request that the Plaintiffs' Complaint be in all respects dismissed and that these answering Defendants have and recover their costs and disbursements herein.

Dated this 20th day of September, 1985.

FREED, DYNES, REICHERT &
BURESH, P.C.

Attorneys for Dickinson Defendants
34 East First Street, P.O. Drawer K
Dickinson, ND 58602-8305

By /s/ George T. Dynes
GEORGE T. DYNES

(Certificate of Service Omitted in Printing)

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF STARK

(Title Omitted in Printing)

AMENDED COMPLAINT

COMES NOW the Plaintiffs, who state to the Court as follows:

INTRODUCTION

This is an action for declaratory and injunctive relief to prevent the Dickinson Public Schools from charging fees to parents living in rural areas for busing their children to school. This action seeks to have N.D.C.C. 15-34.2-06.1 and N.D.C.C. 15-34.2-01 declared unconstitutional based on both state and federal grounds, and to halt the unconstitutional application of N.D.C.C. 15-34.2-06.1 by the Dickinson Public Schools.

2.

The Plaintiff, Paula Kadrmas, is a resident of the town of New Hradec, located in Dunn County, North Dakota. She is unemployed. Her husband is currently employed on a temporary basis doing oil field work. She and her husband have three (3) children, one (1) of which is enrolled in Dickinson Public Schools.

3.

The Plaintiff, Marsha Hall, is also a resident of the town of New Hradec, North Dakota. She is a single parent and is employed part-time as a black jack dealer and cashier in Dickinson, North Dakota, and has two (2) children enrolled in the Dickinson Public Schools.

7

4.

The Plaintiff, Sarita Colton, is the child of Plaintiff Kadrmas. She is in the fourth grade and attends Roosevelt Elementary School in Dickinson.

5.

The Plaintiff Yvonne Hall, is the child of Plaintiff Marsha Hall. She is in the fourth grade and attends Berg Elementary School in Dickinson.

6.

The Plaintiff, Howard Hall, is the child of the Plaintiff Marsha Hall. He is in the ninth grade and attends Dickinson High School.

7.

The Defendant Dickinson Public Schools is a public school district and is governed by the provisions of Title 15, N.D.C.C.

8.

The Defendant, Ross Julson, is Superintendent of the Dickinson Public Schools and is responsible for implementing the policies of the School Board.

9.

The Defendants Clarence Storseth, Nancy Johnson, Merry Johnston, Harold Krieg, and Herb Herauf are members of the School Board of Dickinson Public Schools and as such are responsible for initiating the policy of charging parents for busing their children.

10.

The Defendant, Richard Rykowsky, is Transportation Supervisor for the Dickinson Public Schools, and is responsible for enforcing School Board policy regarding busing fees.

11.

The Defendant, Wayne Sanstead, is Superintendent of Public Instruction of North Dakota and is responsible for general supervision of the common and secondary schools of the state, pursuant to N.D.C.C. 15-21-04.

FACTUAL ALLEGATIONS

12.

Plaintiffs Colton, and Yvonne and Howard Hall are enrolled in the Dickinson Public Schools; they became members of the Dickinson Public Schools after the public schools in New Hradec were closed due to a lack of funds.

13.

The Dickinson Public Schools has adopted a policy wherein parents of children who are being bused to school must pay a yearly fee to the school district; fees are assessed on a per public basis.

14.

The Dickinson Public Schools requires that parents enter into a written agreement before their children will be transported; failure to sign an agreement results in a denial of busing. (A copy of the agreement, which contains a schedule of fees, is attached as Exhibit 1).

15.

The fee schedule for busing contains no provision for waiver, nor are the fees based upon a family's income or ability to pay.

16.

Plaintiff Kadrmas and Plaintiff Hall have refused to sign transportation agreements.

17.

Plaintiff Kadrmas has been informed by Defendant Rykowsky that her child (Plaintiff Colton) would not be bused if she did not sign a transportation agreement. The school bus did not stop at her house on the first day of school, August 28, 1985, and it has not stopped at her house at any time since then. She has had to alternate driving her child to or from school since August 28, 1985. Her family only has one vehicle, which must also be used to help get her husband to work.

18.

Plaintiff Hall has also been informed by Defendant Rykowsky that her children (Plaintiffs Yvonne Hall and Howard Hall) would not be bused if she did not sign a transportation agreement. She was given the option of having her children transported on August 28 only, with transportation provided in the future only if she signed an agreement. Transportation has not been offered to her children since that date, and she has been forced to drive her children to or from school, and alternates driving with friends.

19.

Plaintiff Kadrmas and Plaintiff Hall both live approximately 10-12 miles from Dickinson, which is the distance their children would have to be transported.

20.

Plaintiff Hall and Plaintiff Kadrmas are compelled by N.D.C.C. 15-34.1-01 to send their children to school; failure to do so would subject them to criminal prosecution under N.D.C.C. 15-34.1-04.

21.

The authority for the Dickinson Public Schools policy of charging transportation fees stems from two sources:

(1) N.D.C.C. 15-34.2-01, (attached as Exhibit 2) which makes provision of bus transport optional, and (2), N.D.C.C. 15-34.2-06.1 (attached as Exhibit 3), which allows school districts which have not reorganized to charge fees for transportation service.

22.

The Dickinson Public Schools have not reorganized, and, having exercised their option to provide transportation pursuant to N.D.C.C. 15-34.2-01, is authorized by N.D.C.C. 15-34.2-06.1, to charge transportation fees.

23.

The policy requiring payment of transportation fees is a law within the meaning of the North Dakota Constitution as it derives its authority from N.D.C.C. 15-34.2-06.1.

24.

If Plaintiff Kadrmas were required to pay the transportation fee to the Dickinson Public Schools, she would have to use money that could otherwise be used to provide necessities to her children, including Plaintiff Colton, which would subject Plaintiff Colton, as well as her other children, to unwarranted hardship.

25.

If Plaintiff Hall were required to pay the transportation fee to the Dickinson Public Schools, she would also be forced to use money that could otherwise be used to provide necessities for her children, Plaintiffs Yvonne Hall and Howard Hall, who would be subjected to unwarranted hardship.

FIRST CLAIM FOR RELIEF

*Denial of a Free Public Education
Under the North Dakota Constitution*

26.

Article 8, Section 2 of the North Dakota Constitution requires the establishment of "... a uniform system of free public schools throughout the state."

27.

Sections 15-34-2-01 and 15-34.2-06.1, N.D.C.C. as implemented through the busing policy of the Dickinson Public Schools, violate Article 8, Section 2 of the North Dakota Constitution because access to public schools is a fundamental part of a free public school system. Allowing provision of access to public schools to be optional, and further allowing fees to be charged for the provision of such access is not consistent with the concept of free public schools.

28.

The busing policy of the Dickinson Public Schools forces low income parents such as Plaintiffs to pay a busing fee they cannot afford, or face criminal prosecution under N.D.C.C. 15-34.1-04 (compulsory school attendance) for failure to send their children to school. Placing low income parents in such a dilemma is also inconsistent with the concept of free public schools; thus the busing policy of Dickinson Public Schools violates Article 8, Section 2 of the North Dakota Constitution.

29.

The busing policy of the Dickinson Public Schools also serves to deprive Plaintiffs Colton, Yvonne Hall, and Howard Hall of access to public schools, which is a further violation of Article 8, Section 2 of the North Dakota Constitution.

SECOND CLAIM FOR RELIEF

Denial of Equal Protection under the North Dakota Constitution

30.

Each factual allegation is realleged and incorporated in this claim for relief.

31.

Article 1, Section 22 of the North Dakota Constitution provides that "[a]ll laws of a general nature shall have a uniform operation."

32.

The Dickinson Public Schools, in its schedule of fees in Exhibit 1, charges all parents or guardians of children the same amount to bus their children, regardless of the parents' or guardians' income or ability to pay.

33.

The Dickinson Public Schools, through its busing policy, does not provide for a graduated fee schedule based upon income, nor does it provide for waiver of busing fees to people who cannot afford to pay the fee without undue hardship.

34.

Section 15-34.2-06.1, N.D.C.C., as implemented through the busing policy of the Dickinson Public Schools, does not apply uniformly to all citizens, particularly the Plaintiffs, Paula Kadrmas and Marsha Hall. Children, such as Plaintiffs Sarita Colton, Yvonne Hall, and Howard Hall, are denied bus transportation provided to children with wealthier parents.

35.

The busing policy of the Dickinson Public Schools creates a hardship for those of limited means, such as the Plaintiffs, which is not created for those who can afford to pay the busing fee. The policy does not apply uniformly to all persons because those such as the Plaintiffs would have to pay the fee out of money needed to provide other basic necessities of life for them and their children, whereas for parents of greater means, no other necessities of life would be threatened. Furthermore, parents of greater means are not confronted with the dilemma of paying the busing fee or facing criminal prosecution, as are low income parents such as the Plaintiffs.

THIRD CLAIM FOR RELIEF

Denial of Equal Protection Under the United States Constitution

36.

Each factual allegation is realleged and incorporated in this Claim for relief.

37.

Based upon the allegations contained in the Second Claim For Relief, the busing policy of Dickinson Public Schools violates the 14th Amendment to the United States Constitution, which provides, in pertinent part "... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

38.

By enforcing the busing policy without provision for a waiver or a graduated fee scale, the Dickinson Public

Schools does not apply 15-34.2-06.1, N.D.C.C., with equal effects upon the Plaintiffs or others of similar, limited means.

WHEREFORE, the Plaintiffs request the following relief:

1. An Order of this Court declaring Section 15-34.2-06.1, N.D.C.C. unconstitutional in violation of Article 8, Section 2 of the North Dakota Constitution.
2. An Order of this Court declaring Section 15-34.2-01, N.D.C.C. unconstitutional in violation of Article 8, Section 2 of the North Dakota Constitution.
3. An Order of this Court declaring Sec. 15-34.2-06.1, N.D.C.C. unconstitutional, in violation of Article 1, Section 22 of the North Dakota Constitution.
4. An Order of this Court declaring Section 15-34.2-06.1, N.D.C.C. in violation of the 14th Amendment to the United States Constitution.
5. An Order of this Court declaring the busing policy of the Dickinson Public Schools to be in violation of Article 8, Section 2 of the North Dakota Constitution.
6. An Order of this Court declaring the busing policy of the Dickinson Public Schools to be in violation of Article 1, Section 22 of the North Dakota Constitution.
7. An Order of this Court declaring the busing policy of the Dickinson Public Schools to be in violation of the 14th Amendment to the United States Constitution.
8. An Order of this Court permanently enjoining the Dickinson Public Schools from enforcing its busing policy and from collecting any fee for transportation of children to schools.
9. An Order of this Court permanently enjoining the Dickinson Public Schools from refusing to transport the Plaintiffs' children to and from its schools without charge to the Plaintiffs.

10. For such other and further relief as the Court may deem just and equitable.

Dated this 13th day of December, 1985.

/s/ Edward B. Reinhardt, Jr.
 EDWARD B. REINHARDT, JR.
 JAMES P. FITZSIMMONS
 NORTH DAKOTA LEGAL
 SERVICES, INC.
 P.O. Box 217
 New Town, North Dakota 58763

EXHIBIT 1

DICKINSON PUBLIC SCHOOLS

TRANSPORTATION AGREEMENT

This form represents a legal and binding contract between the Dickinson Public School District #1 and the party whose signature appears below.

The School District will provide bus transportation for school-aged children from their residence to school and return or as agreed upon. The bus fee will apply to all children bused, public or parochial. The bus fee is due and payable at registration time unless prior arrangements are approved through the administration office. Board policy on busing will apply to all families. *Signed forms must be returned to Dickinson Public Schools by August 9, 1985 at P.O. Box 1057, Dickinson, North Dakota, 58602-1057.*

I fully understand this Agreement and do hereby agree to the busing fee as follows:

One child	\$ 97.00
Two children	\$150.00
Three children	\$205.00
Four children	\$260.00
Five children or more	\$315.00

This fee is for the entire school year. One-way rides (a.m. or p.m.) will be one-half of the fee shown. Kindergarten fees will be one-half of the fee shown.

I will have — children on the school bus for the 1985-86 school term. I agree to pay the bus fee as applicable. (Please fill in the number of children to be bused and busing schedule which applies).

My child/children will ride — a.m. and p.m.; — just a.m.; or — just p.m.

Please note on the form if you will have Kindergarten child/children riding on the school bus.

Kindergarten? — Yes or — No

(Signature)

Please note: ***THIS FORM MUST BE RETURNED BEFORE BUS SERVICE WILL BE PROVIDED.***

EXHIBIT 2

15-34.2-01. *Vehicular transportation or lodging may be furnished at option of school board.* The school board of any school district in the state, in its discretion, may furnish to each family living in the district:

1. Vehicular transportation; or

2. The equivalent of the payments specified in section 15-34.2-03 in lodging at some other public school if the same is acceptable to the family.

The board shall not accord the benefits of either subsection 1 or subsection 2 to any family which is receiving payments under section 15-34.2-03. In the event any school board elects to furnish vehicular transportation by public conveyance, the distance that each student must reside from his school in order to be entitled to such transportation may be determined by the school board in each district, but all students in the district shall be treated on the same basis in accordance with such determination. The furnishing of benefits under this chapter may be extended to families living in the district for the purpose of transporting students to another school district or county agricultural and training school within the state, or another school district outside the state, if the attendance of such students in the other districts is in accordance with the provisions of this title governing the same.

EXHIBIT 3

15-34.2-06.1. *Charge for bus transportation optional.* The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. For schoolbus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the state average cost for transportation or the local school district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceding school year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

PLAINTIFF'S EXHIBIT NO. 9
DICKINSON PUBLIC SCHOOLS

TRANSPORTATION AGREEMENT

This form represents a legal and binding contract between the Dickinson Public School District #1 and the party whose signature appears below.

The School District will provide bus transportation for school-aged children from their residence to school and return or as agreed upon. The bus fee will apply to all children bused, public or parochial. The bus fee is due and payable at registration time unless prior arrangements are approved through the administration office. Board policy on busing will apply to all families. *Signed forms must be returned to Dickinson Public Schools by August 9, 1985 at P.O. Box 1057, Dickinson, North Dakota, 58602-1057.*

I fully understand this Agreement and do hereby agree to the busing fee as follows:

One child	\$ 97.00
Two children	\$150.00
Three children	\$205.00
Four children	\$260.00
Five children or more	\$315.00

This fee is for the entire school year. One-way rides (a.m. or p.m.) will be one-half of the fee shown. Kindergarten fees will be one-half of the fee shown.

I will have — children on the school bus for the 1985-86 school term. I agree to pay the bus fee as applicable. (Please fill in the number of children to be bused and busing schedule which applies).

My child/children will ride — a.m. and p.m.; — just a.m.; or — just p.m.

Please note on the form if you will have Kindergarten child/children riding on the school bus.

Kindergarten? — Yes or — No.

 (Signature)

Please note: ***THIS FORM MUST BE RETURNED BEFORE BUS SERVICE WILL BE PROVIDED.***

PLAINTIFF'S EXHIBIT NO. 13

DICKINSON PUBLIC SCHOOLS
 INFORMATION FOR PARENTS
 ON SCHOOL TRANSPORTATION

1985-86

(School District Bus Shop 225-6436)
 Administration Office 225-1550

RICHARD RYKOWSKY, Transportation Supervisor

GENERAL SCHOOL BUS POLICY

I. *BUSING LIMITS*

Transportation on school district rural buses or family transportation payments will be offered to all students who live outside the school bus mileage limits.

The mileage limits are as follows:

Elementary & Junior High Students—3 miles from their assigned schools.

High School Students—4 miles from the school.

When there is room available on rural buses, students living inside the mileage limits will be offered transportation on the basis of the furthest out first.

II. *BUS ROUTES*

The bus routes will be set by the School Board. In-yard service will be provided to all bus patrons. Exceptions to the in-yard service will be made when:

1. The bus patron prefers not to have the bus in the yard.
2. The patron's yard does not have adequate or safe turning space for the bus. The bus should not be required to back up to make the turn under normal situations.
3. The road into the yard from the bus route is deemed unsafe because of road conditions—(snow, mud, etc.)
4. The bus driver will not open any gates.

III. *SCHOOL BUS FEES*

The school bus fees were established on the recommendation of a special busing committee to help cover

the cost of the total busing program. All persons riding on the school district buses must pay the fees.

The busing fee must be paid in advance for the entire school year or arrangements for payment made with the transportation supervisor before the buses will transport the patron's children to and from school. Fees will be due and payable at the time of registration. The busing fees will be paid at the school where the child is registered. However, if a family has children to register at more than one school, the fee may be paid for all their children at one school. Parochial school children's fees are to be paid at the Dickinson Public Schools Administration Office located at 202 East Villard.

No bus fee will be charged for any special education or handicapped student, as specified in the Special Education Busing Policy.

A BUSING AGREEMENT MUST BE SIGNED BY ALL BUSING PATRONS PRIOR TO THE BUSING OF SCHOOL CHILD/CHILDREN.

BUSING FEE SCHEDULE

One child	\$ 97.00
Two children	\$150.00
Three children	\$205.00
Four children	\$260.00
Five or more children	\$315.00

(Amount indicated is for the entire year).

Refunds on busing fees will be made on a prorated monthly basis to any bus patron moving out of the busing area. Patrons moving into the busing area will pay on a prorated monthly basis. Anyone living in the district and planning on moving into the busing area should notify the Administration Office as soon as possible.

REGULATIONS

SCHOOL AUTHORITY

1. The bus routes shall be set by the School Board. Any suggested changes must be reported to the bus supervisor, who, after consultation with the Superintendent, will refer such changes to the School Board, the Board will determine the advisability of such changes.
2. The school bus driver is in complete charge while on the bus and has the same authority as a teacher.
3. When buses are not to be sent out or are to be sent out early, the parents will be notified over Radio Stations KDIX, KLTC and KRRB.
4. If a school child is not at the loading zone when the bus arrives, the driver shall wait two minutes before proceeding.
5. During the winter season, all students riding the bus are urged to wear caps, gloves, and overshoes, as there is always the possibility that the bus could be stalled for a period of time, and this could prevent serious consequences.
6. When blizzard conditions exist, rural patrons will be notified of bus schedules over Radio Stations KDIX, KLTC and KRRB. School may be in session some days when buses do not run.

LOADING OR UNLOADING

1. All school children must remain off the route of the bus until it comes to a complete stop and then may enter the bus in an orderly manner.
2. On entering the bus, the school child must go immediately to his seat which may be assigned by the school bus driver.
3. The school bus rider must remain in his seat until the bus comes to a complete stop for unloading.

4. A school child, who must cross a highway or street after unloading, must pass at least ten feet in front of the bus, stop in line with the left fender, get the all clear sign from the driver and look both left and right before proceeding across the roadway.
5. When loading, a school child, who lives on the left side of a roadway shall remain on the left side of the roadway until the bus comes to a complete stop, and he shall cross only when so authorized by the driver and having checked traffic both to the left and to the right.
6. School children can help to save time by: being on time for the bus in the morning and in the evening, or by letting the driver know if they are not to be on the bus.
7. The driver will not discharge school children at places other than the regular bus stop at the home or at the school, unless proper authorization from the parents or the proper school official.

ON THE BUS

1. Every bus rider shall abide by these rules or be deprived of the right to ride the school bus.
2. The bus driver is to report any misconduct to the bus supervisor.
3. The parents will be notified by the bus supervisor of any misconduct on the bus.
4. All bus riders shall remain seated when the bus is in motion.
5. All bus riders shall keep their head, hand and arms inside the bus.
6. Shuffling, fighting, or obscene language are forbidden.
7. School bus riders shall not tamper with the bus or any of its equipment. Damage to the seats, etc., shall be paid by the offender.

8. School bus riders shall not litter the bus with food or other debris. The eating of peanuts or sunflower seeds is prohibited on the bus.
9. The school bus rider shall not leave books, lunches or other articles on the bus.
10. The bus rider shall keep all books, packages, coats, and other objects out of the aisle.
11. Horseplay is not permitted around, or on the school bus.
12. Any and all articles such as bean-shooters, water pistols, and cap guns shall be taken by the bus driver.
13. A school bus rider shall bring no animals, fire arms, explosives, or anything of a dangerous or objectional nature on the bus.
14. Conversation shall be carried on quietly while on the bus, except when approaching a railroad crossing when absolute quiet must be maintained.
15. School bus riders are expected to be courteous to bus drivers, drivers' assistants, patrol officers, chaperones, and fellow students.
16. Use of tobacco or any tobacco product will not be permitted on the bus.
17. Alcohol of any form will not be permitted on the bus.
18. If a student other than the regular rider wishes to be transported, he or she must present to the bus driver a pass signed by a building principal or bus supervisor.

EXTRA CURRICULAR TRIPS

1. The above rules and regulations will apply to any trip under school sponsorship.
2. Pupils shall respect the wishes of a competent chaperon appointed by the proper school officials.

IMPORTANT TELEPHONE NUMBER

Bus Department—Dickinson Public Schools—225-6436

Please call this number if your child or children are not to be on the bus some days. Call this number if any questions arise concerning the busing of your child or children.

IN THE DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT STARK COUNTY, NORTH DAKOTA

(Title Omitted in Printing)

TRANSCRIPT OF PROCEEDINGS

TESTIMONY OF PAULA KADRMAS, Plaintiff

DIRECT EXAMINATION

.

[37] Q. "Do you know how far it is from your house to Roosevelt School?

A. I would say 16 miles.

Q. All right, how long have you lived in New Hradec?

A. Four years."

.

[41] Q. "All right, has your composition been the same throughout 1985? that is, have you always had five people in your household?

A. No, my household has varied from nine to seven to five. All throughout the year. Five months I have had other relatives staying with me.

Q. All right, are those relatives when living with you are temporary, I take it?

A. Yes.

Q. Did they contribute income to your household?

A. No. None of them have at any point."

.

[42] Q. "Why did you live in New Hradec instead of let's say Dickinson?

A. My husband has horses and we liked it out there.

Q. Okay, it is a choice that you have made, is that right?

A. Yes."

.

[46] Q. Has she been bussed to those schools in previous years?

A. Yes.

Q. Have you been charged a fee for that busing in prior years?

A. Yes.

Q. Have you been able to pay that fee?

A. Pretty much the first years.

Q. Do you know how you stand with the District regarding that?

A. I owe them for last year and as far as I know that is all that I owed for.

. . . .

[47] Q. "Who is providing transportation for her to Roosevelt School?

A. Marcia Hall and myself.

Q. Could you outline for the court how that works, how you are doing that?

A. Marcia will take them in the morning and I will pick them up at night.

Q. Does this entail a special trip for you to pick them up at night? What I mean, do you have any other purpose for going to Dickinson other than picking up the kids from school?

A. No. They are my main priority."

. . . .

[49] Q. "It has been stated throughout these proceedings and in the defendant's trial brief that you probably would get off a lot better financially if you would just pay the fee and do that, is that true?

A. Yes, that is true?

Q. It is costing you more doing it this way I am assuming than if you just paid the contract fee?

A. Yes, it is."

. . . .

CROSS EXAMINATION

. . . .

[61] Q. "Do you think that those four horses are necessary?

A. Yes."

. . . .

[63] Q. "Sarita is not your husband's child, is she?

A. No.

Q. Does she get or do you get any support from Sarita's father?

A. No.

Q. So Ross supports her and even though he hasn't any, strictly speaking, legal obligation, is that correct?

A. That is correct.

Q. Concerning these relatives that were there, are these brothers or sisters of yours?

A. Yes, of mine.

Q. And they lived there and basically were living off of the support of your husband, Ross?

A. They were living off of my husband, yes."

. . . .

[65] Q. "Now, you say that you live a quarter mile off the road?

A. Yes.

Q. No, Sarita did receive this busing service from the district for three years, didn't she?

A. Yes.

Q. And when you first went out there, that service was in force, wasn't it? It was in place and available to you?

A. Yes.

. . . .

[66] A. "You understood though didn't you that you were not necessarily required to put down the \$97.00 right up front?

A. Yes.

Q. Because you have been told and were otherwise informed that they make arrangements for payment?

A. Yes.

Q. In fact earlier years you had made payments over the course of the year?

A. Yes."

. . . .

[67] Q. "And as far as this shopping out there, there aren't any stores in New Hradec, are there?

A. No.

Q. Your closest stores are in Dickinson?

A. Yes."

. . . .

[69] Q. "I gather that you are not complaining about the caliber of service that was being provided in the past years?

A. No, the bus driver was excellent.

. . . .

[71] Q. "Now, as far as your costs of transporting the school children, that is a substantial cost as you indicated?

A. Yes, it is.

Q. I believe you said something in the neighborhood of \$95.00 to \$100.00 per month. Would that be for transportation services? Does that sound right?

A. It is a \$114.00 and some odd cents. We get seven miles to a gallon and six miles in town."

. . . .

[73] Q. "Were you aware that the school was in Dickinson that your children would have to attend?

A. Oh, yes.

Q. So you knew right a way that she had to get into and out of Dickinson every day?

A. Yes."

. . . .

TESTIMONY OF RICHARD RYKOWSKI, Defendant

DIRECT EXAMINATION

. . . .

[121] Q. "All right, and what would be the farthest distance that a student would live or could live from school in Dickinson and still be within your district?

A. Approximately 25 miles one way."

. . . .

CROSS EXAMINATION

. . . .

[138] Q. "Was there an election with the institution on the bus fee?

A. Yes, there was.

Q. Now, was this during the time that you were there, the election?

A. In 1973 it took place.

Q. You were in the district at the time?

A. Yes.

Q. That was just at the time that you joined the district?

. . . .

[139] Q. "Now, is any transportation service furnished by the school district to those children that live within the three miles of the elementary and four miles of the high school?

A. No, there is not any.

. . . .

[141] Q. "So that difference there on the transportation, the difference between your cost of \$312,000.00 and your state aid of \$244,000.00 is about \$68,000.00?

A. That is correct.

Q. So about half of that you get from the fees, is that right?

A. Yes.

- Q. The other half comes from the school district?
 A. General fund.
 Q. The taxes that the local people pay?
 A. That is correct."
-

[142] "Now, you mentioned 589 students and part of those are parochial school children, aren't they?

A. Yes.

Q. The same system is made available to students in the district whether they are going to public or private schools?

A. Yes, it is.

Q. At the same fee?

A. The fee is constant.

Q. Okay, so is that 589 about how many are public students attending the public school.

A. It is about 434.

Q. And what is the total enrollment of the public schools in Dickinson?

A. Approximately 3300.

Q. So if one were to divide that it comes to about 13 per cent, doesn't it of the public students that are riding on the bus?

A. That figure is correct?

Q. And the other 87 get there on their own?

A. That is correct.

.

[152] Q. "In addition to the plaintiffs are there others that haven't paid the fees for previous years in full?

A. Yes.

Q. But you go along with them as they make an effort to make some kind of payment, is that it?

A. Yes.

Q. Have you gone to Court on any delinquent fees?

A. We have not gone to Court."

.

IN DISTRICT COURT
 SOUTHWEST JUDICIAL DISTRICT
 STATE OF NORTH DAKOTA
 COUNTY OF STARK

(Title Omitted in Printing)

MEMORANDUM DECISION

It appearing to the Court that the foregoing litigation was tried to the Court, with each of the Plaintiffs appearing in person by and through their co-legal counsel Dwayne Houdek, Bismarck, N.D. and Edward Reinhart, Newtown, North Dakota, with the Defendant appearing by and through their legal counsel, Attorney George Dynes, Dickinson, N.D. The Court having considered all evidence together with the post trial briefs of each of Plaintiff and Defendant and the Trial Brief of the Attorney General of North Dakota, does herewith enter the following Memorandum Decision.

FACTUAL SUMMARY

Plaintiff Paula Kadrmas is the mother of Sarita Colten, a minor child enrolled in the Dickinson Public School system. Said Plaintiff resides three-fourths of one mile south of New Hradec, N.D., a distance of sixteen miles from the Roosevelt Public School building where Sarita Colten attends classes.

Plaintiff Marsha Hall is the mother of Evonne Hall and Howard Hall, minor children enrolled in the Dickinson School System. Said Plaintiff resides in New Hradec, N.D., a distance of approximately 16 miles from the respective public school buildings where said minor

children attend classes. Howard Hall is a ninth grade student and attends Dickinson High School, while Evonne Hall is a fifth grade student attending Berg Elementary.

The Dickinson Public School District is not a reorganized school district and presently maintains an optional school bus transportation system which provides daily transportation for 585 students, both public and parochial. Transportation by school bus is available only to students who attend elementary school and reside at least three miles from the school building which they attend classes, and to secondary school students who reside at least four miles from the school building which they attend classes. The optional school busing policy of the Dickinson Public School System provides for transportation of the student from his residence to his school building and return. It developed into an optional door to door transportation system as a result of a 1973 election whereupon those parents of students who resided beyond minimum distances as indicated, approved of the present door to door transportation policy and approved the authorization of a transportation fee schedule which complies with section 15-34.2-01 of the North Dakota Century Code. That transportation fee schedule provides in pertinent part for daily school transportation for one child at \$97.00 per year and for two children at \$150.00 per year.

The Dickinson Public School transportation policy for 1985-86 further provides that no student will be transported until the parents or guardian of such student has executed and delivered to Dickinson Public Schools a transportation agreement, and has either made payment of the transportation fee in accordance with the schedule or has made prior arrangement for payment of the same as approved by the Dickinson Public School Administration.

Plaintiff Kadrmas and her family have gross income at or near the poverty level as established by the North

Dakota Department of Human Services while the income of Plaintiff Hall is substantially below the poverty income level. Each of the said Plaintiffs have elected not to enter into transportation agreements with the Dickinson Public School System, and have made private arrangements for the transportation of each of their students to and from school daily. None of the students of the Plaintiffs herein have been absent from school due to lack of transportation. None of the children herein involved are handicapped children or have any special needs.

ISSUES

The Plaintiffs herein challenge the constitutional basis for section 15-34.2-01 and section 15-34.2-06.1 of the North Dakota Century Code. Plaintiffs contending that transportation is an essential and integral part of a free public school education, that the foregoing statutes which authorize discretionary transportation of public school students, is inconsistent with Article VIII, Section 2 of the North Dakota Constitution, and therefore unconstitutional.

Plaintiffs further contend that said statutes are contrary to Article I, Section 22 of the North Dakota Constitution, in that said statutes and application thereof by a uniform fee schedule for optional transportation, does not have a uniform application to each of said Plaintiffs due to their respective economic position.

Finally, Plaintiffs challenge the constitutionality of said statutes upon the basis that the same are discretionary on the grounds of economic wealth, and therefore violative of the equal protection clause of the 14th Amendment to the U.S. Constitution.

Plaintiffs further contend that statutory authority permitting the existence of two different types of school districts within the State of North Dakota, one being the original district while the second is the reorganized

school district, whereby the former is not required to maintain a transportation system while the latter is, is in violation of Article VII, Section 2 of the North Dakota Constitution.

DECISION

Each of Section 15-34.2-01 and 15-34.2-06.1 are entitled to the presumption of validity unless or until it has been clearly shown that each of said statutes contravene either the North Dakota or the United States Constitution. *Patch v. Sebelius*, 320 N.W. 2d 511.

Plaintiffs seek to overcome the foregoing constitutional presumption by arguing to the Court that school bus transportation of students is an essential and integral part and provision of a free public school education. North Dakota Constitution Article VIII, Section 2, states as follows:

"The legislative assembly shall provide for a uniform system of free public school throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education."

Plaintiffs are correct that "All children in North Dakota have the right, under the State Constitution, to a public school education." *In Interest of G.H.*, 218 N.W. 2d 441. Education reasonably defined as the totality of the information and qualities required through instruction and training which further the development of an individual physically, mentally, and morally, does not include all human acts preparatory thereto, including transportation and delivery of the student to the place of learning.

The Plaintiffs offer no authority nor can this court identify any authority to support Plaintiff's argument

that the transportation of public school students to and from their place of residence is encompassed within the concept of a public school education. Clearly the selection of ones location of residence and the inherent need to travel to and from the place of learning by public school students, is common to all within the public school district. Accordingly, the standard of review of sections 15-34.2-06.1 and 15-34.2-01 of the North Dakota Century Code is the standard of the traditional reasonable or rational basis of standard.

Arneson v Olson, 270 N.W. 2d 125.

Plaintiffs offer that the term free public schools must necessarily mean and include those items which are essential to education, and therefore since it is obviously necessary to travel to and from a public school, that transportation of public school students come within the definition of "essential" to education. *Cardiff v. Bismarck Public School District*, 263 N.W. 2d 105. This Court however believes that there is a real and substantive distinction between text books and school bus transportation. The former is an indispensable tool with which to impart knowledge and learning, while the latter constitutes at best only one means by which to accomplish availability so as to enjoy the fundamental right to a public school education.

While the Michigan court in *Sutton v Cadillac Area Public Schools*, 323 N.W. 2d 582, was confronted with the language with moderate differences from that of the North Dakota Constitution, the Michigan Constitution at Article 8, Section 2 provided as follows:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for a free education of its pupils without discrimination as to religion, creed, race, color or national origin."

The fundamental concept encompassed within the Michigan Constitution is in substance that which is present in the North Dakota Constitution. Therein the Michigan Court adhering to the standard set forth in *San Antonio, Independent School District vs Rodriguez*, 411 U.S. 1 rejected the application of the strict scrutiny compelling State interest test, and applied the rational basis test, and therein determined that transportation of public school students to and from schools is not analogous to books and school supplies. This Court believes the Sutton decision to be sound.

The second challenge of the Plaintiffs is that two different types of school districts, one of which is mandated to encompass transportation and the other which is not, fails to meet the constitutional standard set forth in Article VIII, Section 2 of the North Dakota Constitution. It is important to recognize that each school district is accorded reasonable flexibility so as to accommodate the individual needs of each given district, and that a uniform system of free public schools is not synonymous with identical schools or transportation systems. Having previously determined that transportation of public school students by public school bus does not fall within the concept of a free public school education, this Court finds the challenge of the Plaintiffs to be without merit. Historically it is well established that pre-organized school districts are the result of rural school districts with declining enrollment and that statutorily mandated transportation systems is only a means by which to facilitate the opportunity for enjoyment of the fundamental right of a free public school education. It should be noted that the transportation system employed in any re-organized school district is left to the discretion of the individual district.

Finally, Plaintiffs argue that the guarantees of equal protection of laws contained in Article 14 of the United States Constitution and Article I, Section 22 of the North

Dakota Constitution are denied to the Plaintiffs by virtue of the fact that the schedule of fees charged by the Dickinson Public School District are discriminatory based on wealth. Absent the fundamental right or a suspect classification, the test of whether a government classification violates the constitutional guarantees of equal protection is whether the classification has a rational basis. *San Antonio School District v Rodriguez*, 411 U.S. 1. Herein, transportation fees implemented by the Dickinson Public School District is strictly controlled by Section 15-34.2-06.1 of the North Dakota Century Code, and does have a rational basis. The amount of such fees may not exceed the actual cost less State transportation payments received by the local school district, and the schedule of such fees predicated upon the number of children in each family utilizing such transportation is clearly a rational basis for the same.

The Supreme Court of North Dakota in *Seiler vs Gelhar*, 209 N.W. 376, determined that the Constitution of the State of North Dakota did not mandate each school district to furnish public school bus transportation to each public school student, and the discretion was lawful and permissible within the school district to employ the most economic means by which to facilitate a free public school education. That same flexibility, although under different statutes, is the concept granted to the Dickinson Public School District and all original school districts under the provisions of Section 15-34.2-06.1 and 15-34.2-01 of the North Dakota Century Code.

It is therefore the decision of this Court that Plaintiff's constitutional challenge to each of Section 15-34.2-06.1 and 15-34.2-01 of the North Dakota Century Code fails to meet the burden of proof necessary to sustain that challenge.

It is therefore the Order of this Court that the Defendants are entitled to a Judgment of Dismissal of the foregoing action.

It is the further Order of the Court that legal counsel for the Defendant shall prepare Findings of Fact, Conclusions of Law and Order for Judgment in accordance herewith.

Dated at Hettinger, N.D. this 11th day of April, 1986.

BY THE COURT:

/s/ Donald L. Jorgensen
DONALD L. JORGENSEN
District Judge

(Certificate of Service Omitted in Printing)

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF STARK

(Title Omitted in Printing)

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER FOR JUDGMENT

The above entitled matter came on for trial before the Court at the Courthouse in Dickinson, N.D. on December 19th, 1985, at which time and place the Plaintiffs appeared in person and through their attorneys, Dwayne Houdek, Bismarck, N.D. and Edward Reinhart, New Town, N.D., and the Defendants appearing by and through their legal counsel Attorney George T. Dynes, of the Law Firm of Freed, Dynes, Reichert & Buresh, P.C., Dickinson, N.D. The case then proceeded to trial and at the conclusion thereof, the parties submitted additional briefs. After considering the entire matter, including all briefs and arguments of the parties, and having entered its Memorandum Decision dated April 11, 1986, the Court now makes the following:

FINDINGS OF FACT

I

That the Plaintiff, Paula Kadrmas, is the mother of Sarita Colton, a minor child, who is enrolled in the Dickinson Public School System. Said Plaintiff resides three fourths of one mile South of New Hradek, North Dakota, a distance of approximately 16 miles from the School in Dickinson where Sarita Colton attends classes.

II

That the Plaintiff Marsha Hall, is the mother of Yvonne Hall and Howard Hall, both minor children enrolled in the Dickinson Public School System. Said Plaintiff resides in the town of New Hradek, North Dakota, a distance of approximately sixteen miles from the respective school buildings in Dickinson where said minor children attend classes.

III

That the Dickinson Public School District is not a recognized school district and for many years past has operated an optional school bus and transportation system which offers daily bus transportation for a portion of the students in said district, both public and parochial.

IV

That at the time of trial bus transportation was being furnished to 585 students, both public and parochial, of which 437 were public school students out of a total of 3,300 students in the Dickinson Public Schools. Therefore, of the public school students, approximately 13% were obtaining bus transportation and the remaining 87% were furnishing their own transportation to and from school.

V

Those students obtaining bus transportation were given door to door service from their homes to their respective school buildings, which door to door service was instituted as a result of a 1973 election in which the participating parents elected to pay a fee for door to door service. That during the current year transportation fee charged was \$97.00 for one student (applicable to Sarita Colton) and \$150.00 for two students (applicable to the Hall children). Said fees were for the entire school year. The total of such fees charged to all patrons of the bus system of the Dickinson Public School District total ap-

proximately \$34,000.00 annually, which charges were in compliance with the provisions of section 15-34.2-06.1 of the North Dakota Century Code.

VI

The total transportation expenses of the Dickinson Public School District for busing children from home to school and for the last school year (1984-85) were \$312,147.00. Of that amount approximately \$244,000.00 was reimbursed by the school district by the State of North Dakota, leaving a deficit of approximately \$68,000.00. The deficit in turn was paid approximately one-half by the bus fees and the other half, approximately \$34,000.00 was paid for out of the general funds generated by the payment of local real estate taxes.

VII

The Dickinson bus system is available only to those high school students residing more than four miles from school and grade school students residing more than three miles from school. Such mileage limitations have been imposed by the Dickinson Public School Board pursuant to the provisions of Section 15-34.2-01 of the North Dakota Century Code.

VIII

The Plaintiffs Hall and Kadrmas refused to sign an agreement to pay busing fees for the 1985-86 school year and, based upon such refusal were denied use of the bus system by the Dickinson Public School District. No other children within the entire school district, residing beyond the three and four mile limits, were denied use of the bus system and in all of those instances, agreements to pay the annual fee were signed prior to the commencement of the 1985-86 school year.

IX

Both Plaintiffs have made separate arrangements for transporting their children to and from school each day, and such transportation costs greatly exceed the bus fees charged by the Dickinson District. It would be economically beneficial to the Plaintiffs if they were to use the bus system and pay the requested fee, rather than to pursue the present policy of using their own vehicles for school transportation.

X

No advance waiver of the busing fees has ever been made under the Dickinson School District's busing policy, nor have either of the Plaintiffs herein made application for the same.

XI

No busing fee imposed by the Dickinson Public School District has ever been lowered or adjusted by the District on the basis of a parents ability or inability to pay the same, and neither Plaintiff herein petitioned the Dickinson Public School District to lower or adjust the transportation fees in their respective instances.

XII

Plaintiff Kadrmas and her family have gross income at or near the poverty level, as established by the North Dakota Department of Human Services, while the income of the Plaintiff Hall is substantially below the poverty income level.

XIII

None of the children of either Plaintiff are handicapped, or have any special needs. All of them appear to be properly cared for and none have been absent from school because of the lack of access to the bus system.

XIV

That although both of the Plaintiffs owe the Dickinson Public School District for transportation fees from prior years, that existing debt would not deny their children access to the bus system during the current year. All that the Dickinson District has required is that the parents sign the written agreement to pay fees and to make a bona fide effort to pay on those obligations.

XV

The Court finds as a matter of fact, that the Dickinson Public School District has complied in all respects with the requirements of Section 15-34.2-06.1 of the North Dakota Century Code and that all fees charged are in compliance with that statute.

XVI

The Court finds that the bus system maintained by the Dickinson Public School District, although available only to a limited number of students, is operated in compliance with section 15-34.2-01 of the North Dakota Century Code.

From the foregoing findings of fact, the Court herewith makes the following:

CONCLUSIONS OF LAW

I

That the school bus system operated by the Dickinson Public School District, including the fees charged to these Plaintiffs and any other bus patrons, is in conformance with Section 15-34.2-06.1 and Section 15-34.2-01 of the North Dakota Century Code, and all other applicable statutes.

II

That Section 15-34.2-01 and Section 15-34.2-06.1 are constitutional and do not violate any of the provisions of either the United States or the North Dakota Constitution.

III

Providing transportation from homes to school is not an essential or integral part of a system of free public schools, and in the absence of a legislative mandate, is not required.

IV

The fees charged to the Plaintiffs and other bus patrons of the Dickinson Public School District are reasonable, are within the limitation prescribed in Section 15-34.2-06.1 of the North Dakota Century Code, and appropriately apply to all bus patrons on the same basis.

V

The Constitutional standard of review of the statutes in question is the rational basis standard and not that of strict scrutiny.

VI

That Section 15-34.2-01 and Section 15-34.2-06.1 of the North Dakota Century Code have been given uniform operation in this case and do not violate Article I, Section 22 of the North Dakota Constitution.

VII

The bus fee schedule does not violate any constitutional guarantees of equal protection. The fees are strictly controlled by Section 15-34.2-06.1 of the North Dakota Century Code, which has a rational basis.

VIII

That all actions by all of the Defendants have been in compliance with the applicable statutes and in compliance with all constitutional guarantees.

IX

That the Defendants are entitled to a Judgment in this case in their favor and against all of the Plaintiffs, providing for a dismissal of Plaintiffs Complaint in all respects. Further, that neither party hereto shall be entitled to costs or disbursements as a result of the foregoing litigation.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 30th day of April, 1986 at Hettinger, N.D.

BY THE COURT:

/s/ Donald L. Jorgensen
DONALD L. JORGENSEN
District Court

(Certificate of Service Omitted in Printing)

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF STARK

(Title Omitted in Printing)

JUDGMENT

The above entitled matter came on for trial before the Court at the Courthouse in Dickinson, North Dakota, on December 19, 1985, at which time and place the Plaintiffs appeared in person and through their attorneys, Duane Houdek and Ed Reinhardt, and the Defendants appeared by and through their counsel, George T. Dynes, of the firm of Freed, Dynes, Reichert & Buresh, P.C. The case then proceeded to trial and at the conclusion thereof the parties submitted additional briefs. After considering the entire matter, including all briefs and arguments of the parties, and having entered its Memorandum Decision dated April 11, 1986, and having entered its Findings of Fact, Conclusions of Law and Order for Judgment:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, DETERMINED AND DECREED AS FOLLOWS:

I.

That the school bus system operated by the Dickinson Public School District, including the fees charged to these Plaintiffs and any other bus patrons, is in conformance with Section 15-34.2-06.1 and 15-34.2-01 NDCC, and all other applicable statutes.

II.

That Sections 15-34.2-01 and 15-34.2-06.1 are constitutional and do not violate any of the provisions of either the United States or the North Dakota Constitution.

III.

Providing transportation from home to school is not an essential or integral part of a system of free public schools and, in the absence of a legislative mandate, is not required.

IV.

The fees charged to the Plaintiffs and other bus patrons of the Dickinson District are reasonable, are within the limitations prescribed in Section 15-34.2-06.1 NDCC and appropriately apply to all bus patrons on the same basis.

V.

The Constitutional Standard of Review of the statutes in question is the rational basis standard and not that of strict scrutiny.

VI.

That Sections 15-34.2-01 and 15-34.2-06.1 NDCC have been given uniform operation in this case and do not violate Article I, Section 22 of the North Dakota Constitution.

VII.

The bus fee schedule does not violate any constitutional guarantees of equal protection. The fees are strictly controlled by 15-34.2-06.1 NDCC, which has a rational basis.

VIII.

That all actions by all of the Defendants have been in compliance with the applicable statutes and in compliance with all constitutional guarantees.

IX.

The Defendants are entitled to and are herewith granted judgment in their favor and against all of the Plaintiffs, and accordingly this action by the Plaintiffs is

dismissed in all respects. None of the parties is entitled to any costs as a result of this litigation.

WITNESS, The Hon. Donald L. Jorgensen, Judge of the above entitled Court, and my hand and the seal of said Court, this 6th day of May, 1986.

/s/ Paulette Reule
PAULETTE REULE,
Clerk of the District Court

SUPREME COURT OF NORTH DAKOTA

Civ. No. 11262

PAULA KADRMAS; MARSHA HALL; SARITA COLTON, a minor, by her next friend, PAULA KADRMAS; YVONNE HALL, a minor by her next friend, MARSHA HALL; HOWARD HALL, a minor, by his next friend, MARSHA HALL,

Plaintiffs and Appellants,

v.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his capacity as Superintendent of the Dickinson Public Schools; CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD KRIEG, HERB HERAUF, in their capacity as members of the Dickinson School Board; RICHARD RYKOWSKY, in his capacity as Transportation Supervisor of the Dickinson Public Schools,

Defendants and Appellees.

March 26, 1987

ERICKSTAD, Chief Justice.

This is an appeal from a district court judgment upholding, against constitutional attack, schoolbus fees charged by the Dickinson Public Schools (the School District). We affirm.

The School District offers schoolbus transportation to and from school for elementary level students residing more than three miles from the school and for high school

students residing more than four miles from the school. For students to receive such transportation their parents must sign a contract agreeing to pay a fee to defray part of the cost. Plaintiffs Paula Kadrmas and Marsha Hall have children attending elementary school in Dickinson, and both families reside approximately sixteen miles from the school. Paula and Marsha refused to sign the School District's contract for schoolbus service for the 1985-86 school year; instead, they transported their children to and from school at costs to them which, the trial court found, "greatly exceed the bus fees charged by the Dickinson District."

During the period relevant to this case approximately 13 percent of the students were receiving schoolbus transportation. The fee charged by the School District for this service was \$97.00 per school year for one student and \$150.00 per school year for two students. This fee generated approximately 11 percent of the School District's total cost for providing the service. Approximately 89 percent of the total cost was provided to the School District from state and local tax revenues.

The plaintiffs filed this action against the School District seeking to enjoin collection of any fee for schoolbus transportation. The district court entered a judgment dismissing the action on its merits, and from that judgment the plaintiffs have filed this appeal.

Section 15-34.2-06.1, N.D.C.C., provides a limited authorization for school districts to charge for schoolbus service:

"The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. . . . For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and

the local school district's cost for transportation during the preceding school year. . . ."

The plaintiffs assert that the foregoing statute unconstitutionally authorizes fee charges for schoolbus services in violation of the mandate within Art. VIII, § 2, N.D. Const., for a uniform system of free public schools:

"Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education."

In *Cardiff v. Bismarck Public School District*, 263 N.W. 2d 105 (N.D.1978), this court analyzed the language of Art. VIII, § 2, N.D. Const., in holding that school districts are required to provide elementary school textbooks without charge:

"We must assume that the framers of the constitution made a deliberate choice of words which reflected or expressed their thoughts. The term 'free public schools' without any other modification must necessarily mean and include those items which are essential to education.

* * * *

"The word 'free' takes on its true and full meaning from the context in which it is used. There can be no doubt that the term means 'without charge or cost.' In the absence of any other showing we must conclude that the term was commonly understood by the people to mean 'without charge or cost.' Books and school supplies are a part of the education system. This is true whether we apply the necessary elements of the school's activities test or the integral

part of the educational system test." 263 N.W.2d at 113.

The plaintiffs in this case urge us to construe Art. VIII, § 2, N.D. Const., to require that school districts provide transportation for students to and from school without any fee or charge to the parents for such service.

In construing a constitutional provision we must undertake to ascribe to the words used that meaning which the people understood them to have when the constitutional provision was adopted. *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898 (N.D. 1977). In so doing, it is appropriate to consider contemporaneous and long-standing practical interpretations of the provision by the Legislature where there has been acquiescence by the people in such interpretations. *Sanstead, supra*; *State ex rel. Linde v. Robinson*, 35 N.D. 417, 421-422, 160 N.W. 514, 516-517 (1916). Section 148, of our original constitution adopted in 1889, the predecessor to Art. VIII, § 2, N.D. Const., contained identical language mandating "a uniform system of free public schools." At that time there was no statutory provision requiring or authorizing school districts to provide student transportation or to compensate parents for transporting their children to and from school. Our statutory law remained silent with regard to school districts providing transportation or reimbursement for transporting students until 1903, when a law was enacted authorizing school boards to arrange and pay for student transportation under specified circumstances or when "petitioned by a majority of the district voters." 1903 N.D.Sess.Laws, Ch. 83, §§ 3, 4. Section 15-34.2-06.1, N.D.C.C., specifically authorizing a limited schoolbus service charge by nonreorganized school districts, was first enacted in 1979. 1979 N.D.Sess.Laws, Ch. 229, § 1.

The compulsory attendance law in effect in 1889, which required every parent to send school age children to a public school, exempted parents from that requirement

where "no public school is taught for the time required, and within two miles by the nearest way to the home of such person within the school township." 1883 N.D. Sess. Laws, Ch. 44, § 119. Although this provision was amended occasionally, it was not until 1971 that the Legislature entirely omitted distance between one's residence and the school as a basis for exemption from the compulsory attendance requirement. 1971 N.D.Sess.Laws, Ch. 158, § 5. The compulsory attendance law was amended in 1907 to provide that the district school board, in districts with children residing beyond three miles from the school, "shall provide transportation for such children to and from school." From that time forward state law has in certain circumstances required and in other circumstances merely authorized school districts to participate in transporting or providing compensation for transporting students to and from school.

We do not believe that a detailed chronological recitation and analysis of the statutes relating to student transportation would be helpful in resolving the issue before us. Suffice it to say that our laws on this subject demonstrate a long-standing practice of state and school district involvement in student transportation. However, our laws also clearly demonstrate that the Legislature has never required that the state or school districts assume the entire responsibility or cost of transporting students. Although state and school district involvement in providing student transportation has been significant, the obligation of transporting students to and from school has been shared by the parents or other caretakers of the children, and the people of this state have acquiesced in sharing that responsibility from the first days of statehood to the present time.¹

¹ In the book "*History of North Dakota*" Elwyn B. Robinson provides the following interesting historical perspective regarding "family" responsibility for student transportation:

"Transportation—the conquest of distance on the vast, semi-arid grassland—was the key to consolidation and hence to the

Pursuant to Section 15-34.1-01, N.D.C.C., every parent, guardian, or other person having control of any educable child must "send or take such child to a public school" unless an exception applies. A substantively identical provision was in effect at the time our constitution was adopted in 1889. Revised Code 1889, § 759. Section 14-09-08, N.D.C.C., places a duty upon parents to give a child "support and education suitable to the child's circumstances," and a substantively identical provision was likewise in effect in 1889. Revised Code 1889, § 2779.

We believe the long-standing legislative practice of making student transportation a shared responsibility between school districts and parents provides some indication that the constitutional requirement of a "uniform system of free public schools" does not mandate free student transportation.

Such a conclusion is impliedly supported by this court's decision in *Seiler v. Gelhar*, 54 N.D. 245, 209 N.W. 376 (1926). The plaintiff parent in that case asserted that the constitutional mandate of a uniform system of free public schools required the school district to provide actual transportation for his child to and from school. The school district, having determined that it would be prohibitively expensive to provide actual transportation for the plaintiff's child, offered to monetarily compensate the plaintiff based upon a district approved compensation schedule. The court, while recognizing that the proffered compensation was "manifestly inadequate," rejected the plaintiff's constitutional argument:

improvement of rural education. Superintendent John C. West, later president of the University of North Dakota, reported that Webster School, consolidated in 1904, found a family system without remuneration to be the best way of transporting pupils: 'Horses are plentiful and where the children are too small to drive, there is always a large boy who will take care of this for his board. . . . When a horse is hitched up, one or two miles, more or less, makes little difference.' " (page 304)

"The maximum schedule of compensation authorized is manifestly inadequate, when measured by accepted standards of commercial values, in cases where patrons are situated like the plaintiff in this action. We think the inference is necessary, from the legislation on the subject, that the Legislature did not intend it should be obligatory upon the school board to pay every patron the actual value or cost of the service of transporting his own children to school. We think the Legislature recognized the fact that, while the public is vitally interested in the maintenance of adequate school facilities, of which all children in the state may at all times take advantage, the patron or parent, likewise, has a vital interest in obtaining an education for his child, and that such parental solicitude might be sufficient, in cases like the one at bar, where full compensation could not practically be made, to supply the incentive to transport the child which full compensation for the service, according to the ordinary standards of value, would have furnished.

* * * *

"The constitutional argument is without merit." 209 N.W. at 379.

The *Gelhar*, *supra*, court recognized that the Legislature, cognizant of the public interest in maintaining school facilities accessible to all children in this state, had attempted to deal with the serious problem of student transportation. The court also recognized, however, that parents have a "vital interest" in obtaining an education for their children, and the court implicitly found a corresponding parental obligation to participate in transporting their children to and from school irrespective of whether full reimbursement from the school district is forthcoming.

We have found only one jurisdiction in which an appellate court has determined whether or not free student

transportation is mandated by its state constitution. In *Sutton v. Cadillac Area Public Schools*, 117 Mich.App. 38, 323 N.W.2d 582 (1982), the Michigan Court of Appeals concluded that transportation of students to and from school is not an essential part of a system of free public education and that failure of a school district to provide free transportation does not violate the Michigan Constitution, which contains a provision substantively identical to Art. VIII, § 2, N.D. Const., requiring the Legislature to provide a system of free public schools. In 1970, prior to the *Sutton* decision, the Michigan Constitution was amended to also provide that "the legislature may provide for the transportation of students to and from any school." That provision, which has no counterpart in our state constitution, weighed in favor of the Michigan court's conclusion that its constitution allows, but does not require, free transportation. *Sutton* does demonstrate, however, that a constitutional provision requiring a system of free public schools does not necessarily encompass free transportation, and in that respect the case is helpful for interpreting our constitutional provision.

The plaintiffs assert that free student transportation must be part of a system of free public schools, because it is an essential element of the education process. No one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein. That does not, however, mean that student transportation is an element or part of the public school system which the constitution requires the Legislature to provide free of charge. In our view transportation is not a necessary element of the educational process, and it is not an integral part of the educational system to which the constitution refers in requiring the Legislature to provide "a uniform system of free public schools." Although transportation may be an important prerequisite to accepting the educational opportunities offered in the public school system it is not part of the system. Other important

prerequisites to participating in the educational opportunity offered by the public school system might include good nutrition and proper immunizations. As in the case of school transportation, the state may wish to participate in the providing of such prerequisites, but Art. VIII, § 2, N.D. Const., does not mandate that it do so.

We hold that Art. VIII, § 2, N.D. Const., does not require the state or school districts to provide free transportation for students to and from school. We further hold that Section 15-34.2-06.1, N.D.C.C., which authorizes charges for schoolbus service, does not violate Art. VIII, § 2, N.D. Const.

The plaintiffs also assert on appeal that the schoolbus charges authorized under Section 15-34.2-06.1, N.D.C.C., violate their rights to equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 22 of the North Dakota Constitution. Although not clearly enunciated, the plaintiffs apparently base their equal protection claim on two separate alleged discriminatory classifications. First, they assert that the transportation charges create a wealth classification which discriminates against poor persons. Second, they assert that the statute, by authorizing only school districts which have not been reorganized to charge a schoolbus service fee, creates a classification between reorganized and nonreorganized districts which discriminates against persons residing in the nonreorganized districts.

There are three separate standards of review for equal protection claims. The standard used in a particular case depends upon the challenged statutory classification and the right allegedly infringed. See *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). If the case involves an inherently suspect classification or an infringement of a fundamental right the statute is subject to strict judicial scrutiny and will be held invalid unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the classification are nec-

essary to further its purposes. See *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621 (N.D.1977). An intermediate standard of review is utilized in those cases where "an important substantive right" is involved. *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986). When using the intermediate standard of review we seek to determine whether or not there is a close correspondence between the statutory classification and the legislative goals the statute was designed to achieve. *Patch v. Sebelius*, 320 N.W.2d 511 (N.D. 1982). In all other cases we employ the rational basis standard of review, whereby a legislative classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. *State v. Knoefler*, 279 N.W.2d 658 (N.D. 1979). The rational basis test is the traditional standard for scrutinizing legislation facing equal protection attack and is most often utilized in cases involving economic and social welfare legislation. See *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

In our view the challenged statute in this case is purely economic legislation which neither involves a suspect classification nor a fundamental or important substantive right which would require the strict scrutiny or intermediate standard of review. In similar equal protection challenges to legislation involving student transportation the traditional rational basis standard of review has been employed. *Shaffer v. Board of School Directors*, 687 F.2d 718 (3rd Cir.1982); *Sutton v. Cadillac Area Public Schools*, 117 Mich.App. 38, 323 N.W.2d 582 (1982); *Harrison v. Morehouse Parish School Board*, 368 So.2d 1113 (La.Ct.App.1979). We conclude that the rational basis test is the appropriate standard of review for the plaintiffs' equal protection claims in this case. Accordingly, Section 15-34.2-06.1, N.D.C.C., must be upheld unless it is patently arbitrary and fails to bear a rational relationship to any legitimate government purpose.

The plaintiffs assert that the schoolbus service fee authorized by the challenged statute unconstitutionally discriminates against poor or indigent persons because they are more burdened by and have a lesser ability to pay the fee than nonindigent persons. The plaintiffs do not and cannot assert in this case that the fee actually denied their children an opportunity to attend school. The parents have transported their children to and from school at a cost which they concede is substantially greater than the schoolbus fee charged by the School District. A statutory scheme under which a school district offers to provide student transportation at considerably less expense to the parent than self-transportation would entail does not constitute a deprivation which offends either federal or state equal protection rights. The denial of benefit by this legislation, if one can be found, does not constitute the type of detriment or harm against which equal protection rights are intended to protect. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed2d 16 (1973). Although Section 15-34.2-06.1, N.D.C.C., authorizes school districts to charge a limited fee for schoolbus service, a substantial part of the cost of that service is paid, under statutory authorization, by state and local tax revenues. We agree with the following statements of the Michigan Court of Appeals in *Sutton, supra*, in rejecting the contention that charging for schoolbus service creates a wealth classification that violates the equal protection rights of the poor:

"Allocation of a school district's limited funds to education-related matters other than transportation is not irrational. Equal protection does not require that government choose between attacking every aspect of a problem or not attacking the problem at all. . . . Government does not deny equal protection by making the same grant available to persons of varying economic needs." [Citations omitted.] 323 N.W.2d at 584-585.

We conclude that the charges authorized by Section 15-34.2-06.1, N.D.C.C., are rationally related to the legitimate governmental objective of allocating limited resources and that the statute does not discriminate on the basis of wealth so as to violate federal or state equal protection rights.

The plaintiffs also contend that Section 15-34.2-06.1, N.D.C.C., violates their equal protection rights by treating reorganized and nonreorganized school districts differently. The statute allows only school districts which have not been reorganized to charge a fee for schoolbus service. Pursuant to Sections 15-34.2-01 and 15-34.2-03, N.D.C.C., a school district may, in its discretion, provide vehicular transportation, provide lodging payments, or provide compensation to families for transporting their children to and from school. Under those sections it is within a school board's discretion whether to avail itself of such options to furnish or compensate student transportation. However, under Section 15-27.3-10, N.D.C.C., a reorganized school district must either provide schoolbus service or compensate families for transporting their children to and from school. We believe the foregoing statutes, to the extent that they treat reorganized and nonreorganized school districts differently regarding student transportation, constitute legislation which is rationally related to a legitimate government purpose. The obvious purpose of such legislation is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system. The legislation provides incentive for the people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district. We conclude that the legislation serves a legitimate government objective and that the statutory scheme is rationally related to accomplishing that objective. Accordingly, we hold that Section 15-34.2-06.1, N.D.C.C., does not violate the federal or

state equal protection rights of persons residing in non-reorganized districts.

The judgment of the district court dismissing the plaintiffs' action on its merits is affirmed.

GIERKE and VANDE WALLE, JJ., concur.

LEVINE, Justice, concurring and dissenting.

I join in Part I of the majority opinion holding that free transportation for students to and from school is not constitutionally mandated under the North Dakota Constitution. I dissent, however, from the equal protection analysis. I would hold that North Dakota Century Code § 15-34.2-06.1 and the Dickinson School District policies, as applied to these plaintiffs, violate Article I, § 22, of the North Dakota Constitution. I would therefore reverse the judgment of the district court.

My point of departure with the majority is its reliance on *Schaffer v. Board of School Directors*, 687 F.2d 718 (3 Cir.1982); *Sutton v. Cadillac Area Public Schools*, 117 Mich.App. 38, 323 N.W.2d 582 (1982); and *Harrison v. Morehouse Parish School Board*, 368 So.2d 1113 (La.Ct. App. 1979), for its conclusion that under the North Dakota Constitution, the rational basis standard of review is appropriate for a wealth-based equal protection challenge to legislation authorizing a fee to be charged for transportation and that the legislation so reviewed passes constitutional muster. These cases rest on the proposition that, under the federal Constitution, education is not a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). They provide little support and less guidance for holding that in North Dakota, where education is a fundamental right, one guaranteed by the North Dakota Constitution, access to that fundamental right is not important enough to be re-

viewed with stricter scrutiny than we review purely economic legislation.

The question before us, which the cases cited by the majority do not help us decide, is whether transportation provided by a school district is an important substantive right so as to warrant an intermediate standard of review which affords no presumption of constitutionality to the legislation authorizing a fee to be charged for this transportation.

We hold in this case that free busing is not constitutionally mandated. However, neither is a criminal appeal. Yet, an indigent criminal defendant is entitled to access to the appellate process. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). While wealth alone may not be sufficient to require strict judicial scrutiny, where wealth-based discrimination coalesces with an important individual interest, an intermediate standard of review is appropriate. *Griffin, supra*; *Douglas, supra*; *Plyler v. Dole*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). See also *State v. Carpenter*, 301 N.W.2d 106 (N.D.1980). *Griffin* and *Douglas* recognized that without an attorney or a transcript, an appeal is meaningless. So too, without access to education, the right to education is meaningless. Furthermore, unlike the right to appeal, the right to education is a fundamental right under our State Constitution. *In re G.H.*, 218 N.W.2d 441 (N.D.1974).

In *Plyler, supra*, the United States Supreme Court recognized that education plays a fundamental role in society. Under review in *Plyler* was a Texas statute limiting public education funds to citizens and aliens, resulting in local policies requiring tuition to be paid by illegal aliens. The Court employed an intermediate standard of review under which the deprivation of education would be constitutionally sound only if it furthered a substantial goal of the State. No such goals were demon-

strated and so the Court found a violation of the equal protection clause under the fourteenth amendment of the United States Constitution.

In a rural state like ours, it is clear that transportation is extremely important to education. Without transportation, some children would be literally cut off from education. I would therefore apply an intermediate level of scrutiny to the statute in question to determine whether there is a close correspondence between the statutory classification and the legislative goals the statute was designed to achieve. *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986).

The only goal the State can assert to support the statute and its burden on the poor is a financial goal. The objective must be that it is necessary to raise more money than is provided by taxation. However, there is evidence that the district could provide busing to the poor within its present budget without cutting other services. It is also noteworthy that athletes are bused to athletic competitions without charge. Each of us is aware of the economic recession in our State. The energy and agricultural sectors are seriously depressed. We read and hear about the need to cut back, to pull in our belts. Nonetheless, our need to conserve financial resources may not be implemented by depleting our constitutional resources. Our "concern for the preservation of [financial] resources standing alone can hardly justify the classification used in allocating those resources." *Plyler, supra*, 457 U.S. at 227, 102 S.Ct. at 2400 (citing *Graham v. Richardson*, 403 U.S. 365, 374-375, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971)).

The school district's policies in implementing NDCC § 15-34.2-06.1 are to charge the same fee to all families whose children ride the bus. No waiver of transportation fee has ever been made, nor has the fee ever been modified. There is no consideration of a family's income in setting the fee. Thus, where an indigent parent is

unable to pay for transportation, she is simply out of luck. The trial court found the gross income of one plaintiff to be at or near poverty level, and the income of the second plaintiff substantially below the poverty income level. While I agree with the majority that parents share with the State the obligation to transport their children to school, both the State and the school district must recognize that some parents are financially unable to fulfill this obligation without onerous consequences. Because the statute and the policies implementing that statute exclude the plaintiffs, solely because of their indigency, from the exercise of an important right, *i.e.*, to participate in busing provided by the school district, I believe they do not operate uniformly and violate Article I, § 22 of the North Dakota Constitution. I would therefore reverse the district court judgment.

As for the majority's treatment of the nonreorganized-reorganized classification, I would decline to consider the issue because it was raised only in the reply brief. We are thus without the benefit of a responsive brief. We have often said that we do not consider constitutional issues not properly raised. I believe that principle should prevail here. We need to preserve our limited judicial resources and I would refrain from undertaking the resolution of a constitutional question raised in a reply brief. This is not the heavy artillery we have preached is necessary for constitutional questions.

I therefore concur in the first portion of the opinion. From the remainder, I respectfully dissent.

LEVINE and MESCHKE, JJ., concur.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

(Title Omitted in Printing)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Paula Kadrmas and Sarita Colton, by her next friend, Paula Kadrmas, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of North Dakota, affirming the dismissal of the complaint, entered in this action on March 26, 1987.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

/s/ Edward B. Reinhardt, Jr.
EDWARD B. REINHARDT, JR.
Counsel of Record
North Dakota Legal
Services, Inc.
P.O. Box 217
New Town, ND 58763

/s/ Duane Houdek
DUANE HOUDEK
Legal Assistance of
North Dakota, Inc.
of Counsel
Attorneys for Appellant

Filed June 19, 1987

SUPREME COURT OF THE UNITED STATES

No. 86-7113

PAULA KADRMAS, *et al.*,
Appellants

v.

DICKSON PUBLIC SCHOOLS, *et al.*

On Appeal from the Supreme Court of North Dakota

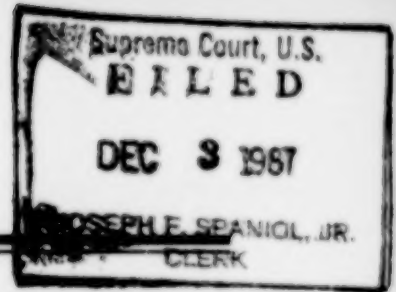
ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 5, 1987

APPELLANT'S BRIEF

(6)
No. 86-7113



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

PAULA KADRMAS, *et al.*

Appellants,

v.

DICKINSON PUBLIC SCHOOLS, *et al.*

Appellees.

On Appeal From The Supreme Court Of North Dakota

BRIEF FOR THE APPELLANTS

EDWARD B. REINHARDT, JR.

Counsel of Record

North Dakota Legal Services, Inc.

P.O. Box 217

New Town, North Dakota 58763

(701) 627-4719

DUANE HOUDEK

Legal Assistance of North Dakota

P.O. Box 1893

Bismarck, North Dakota 58502-1893

(701) 222-2110

Counsel for Appellants

QUESTIONS PRESENTED

1. Whether North Dakota statutes and policies charging a fee in some, but not all, school districts as a pre-condition to a child's receipt of state and local busing benefits violate the equal protection clause.

2. Whether the Dickinson busing fee applied without waiver, deprives families who are unable to pay the fee of a minimum access to education.

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATEMENT.....	2
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	13
I. STATE STATUTES AND POLICIES CHARGING A FEE IN SOME, BUT NOT ALL, SCHOOL DISTRICTS AS A PRE-CONDITION TO A CHILD'S RECEIPT OF STATE AND LOCAL BUSING BENEFITS VIOLATE THE EQUAL PROTECTION CLAUSE	13
A. Education Is An Important Individual Right And Plays A Fundamental Role In Society ..	13
B. The Dickinson Busing Fee, For Some, Acts As A Barrier To Minimum Access To Education ..	15
C. The State Busing Scheme Bears No Rational Relationship To Any Ostensible State Interest ..	18
II. THE DICKINSON BUSING FEE, APPLIED WITHOUT WAIVER, DEPRIVES SARITA KADRMAS OF MINI- MUM ACCESS TO EDUCATION	22
A. Certain Rights Provided By A State Are So Important That They May Not Be Withheld Completely From Those Unable To Pay For Them	22
B. The Factors This Court Set Forth In <i>Bearden v.</i> <i>Georgia</i> Demonstrates That Busing Students To School Is A Right That May Not Be With- held From The Indigent	23
CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases	Page
<i>Anderson v. Breithbarth</i> , 245 N.W. 483 (N.D. 1932).....	14
<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983).....	12, 24
<i>Bismarck School District v. Walker</i> , 370 N.W.2d 565 (N.D. 1985)	9
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971).....	12, 23
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	13
<i>Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	11, 15, 16
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956).....	12, 22
<i>In the Interest of G.H.</i> , 218 N.W.2d 441 (N.D. 1974) ...	14
<i>Kadmas v. Dickinson Public Schools</i> , 402 N.W.2d 897 (N.D. 1987).....	11, 17, 20
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972)	23
<i>Little v. Streater</i> , 452 U.S. 1 (1981).....	23
<i>Ortwein v. Schwab</i> , 410 U.S. 656 (1973)	25
<i>Papasan v. Allain</i> , 478 U.S. —, 106 S.Ct. 2932 (1986).....	18, 25
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	11, 14, 16, 21
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974)	25
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	17
<i>Smith v. Bennett</i> , 365 U.S. 708 (1961)	22
<i>United States v. Kras</i> , 409 U.S. 434 (1973).....	25
<i>Western & Southern Life Insurance Co. v. State Board of</i> <i>Equalization</i> , 451 U.S. 648 (1981)	20
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982).....	11, 16, 19
CONSTITUTIONAL PROVISIONS	
<i>United States Constitution</i>	
Amendment XIV	1
<i>North Dakota Constitution</i>	
Article VIII, Section 1	14
STATUTES	
North Dakota Century Code 12.1-32-01.....	6
North Dakota Century Code 15-27.3-10.....	7
North Dakota Century Code 15-34.1-01.....	6

Table of Authorities Continued

	Page
North Dakota Century Code 15-34.1-04.	6
North Dakota Century Code 15-34.1-05.	6
North Dakota Century Code 15-34.2-06.1.	1, 7, 8
Chapter 266, Section 232, 1911 Laws of North Dakota..	7
Chapter 62, Section 83, 1890 Laws of North Dakota....	7

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota, which appears in the Joint Appendix at p. 53, is reported at 402 N.W.2d 897 (N.D. 1987).

The Memorandum Decision of the Stark County District Court, dated April 11, 1986, is not reported. It is reprinted in the Joint Appendix, p. 35.

JURISDICTION

The Judgment of the North Dakota Supreme Court was entered on March 26, 1987. A Notice of Appeal to the Court was timely filed in the Supreme Court of North Dakota on June 19, 1987 (J.A. 69). Probable jurisdiction was noted on October 5, 1987 (J.A. 70). The jurisdiction of the Court is being invoked under 28 U.S.C. 1257 (2).

STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

No state shalldeny to any person within its jurisdiction the equal protection of the laws.***

Section 15-34.2-06.1, North Dakota Century Code (1985 Supp.):

15-34.2-06.1. *Charge for bus transportation optional.* The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. For school bus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation payment and the state average costs for transportation or the local school district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not

exceed an amount equal to the difference between the state transportation payment and the local school district's costs for transportation during the preceding year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

STATEMENT OF THE CASE

This case involves the constitutionality, under the Equal Protection clause, of a fee charged of parents in some North Dakota school districts for busing their children to school, where that fee is not charged of parents in a majority of the state's school districts.

Specifically in question is a busing fee imposed by the Dickinson, North Dakota, school district that is fixed according to the number of children in a family, and does not take into account, either for the purpose of setting the amount of the fee or for consideration of waiver, the family's income or ability to pay.

Two families within the Dickinson district did not sign a required contract or pay the busing fee in 1985 and their children were denied a seat on the schoolbus. The families transported their children to school themselves during the 1985 school year.

A. The Kadrmas Family

Sarita Kadrmas lives with her parents, Paula and Ross Kadrmas, and her sister and brother, Miranda and Tyler, about 3/4 of a mile from the town of New Hradec, North Dakota, on a farm that is about 1/4 mile off the county road. She lives in the Dickinson school district and attends Roosevelt elementary school in Dickinson, which is about 16 miles from her home.

At the time of the trial, she was 9 years old and attended the fourth grade. Miranda and Tyler were ages two and one, respectively; when they begin school they also will go to a school in Dickinson.

In years past, the town of New Hradec had its own school, but businesses in the town began closing, and in 1979 the school closed as well. Its children then started going to school in Dickinson. When the Kadrmas family moved to New Hradec in 1981, they assumed their children would be bused to school for free, as had been done in South Dakota, where Paula was raised.

The Kadrmas family lives on the "homestead" property of Ross' father, where they rent a farmhouse and surrounding land for \$200 per month, plus electricity of \$95 a month and heat in the winter of about \$135 per month. Ross' brothers run a farm and ranch on adjoining acreage.

Ross Kadrmas has worked in the oil fields of North Dakota for several years. This offers sporadic employment, with a pattern having developed during their marriage of periods of employment followed by times when Ross receives unemployment compensation benefits. The work is such that he works on a rig for a month, is laid off for a week or so, and then begins again on a new rig.

At the time of trial, Ross was working in the oil fields near Tioga, North Dakota. This field was a little more than a two hour drive from his home.

Because the Kadrmas family has only one vehicle, a 1979 Ford pickup, it was necessary for Paula to give Ross a ride to a "pickup point" six or seven miles north of their home where he would get a ride to the oil field from co-workers. This would allow Paula to give Sarita a ride to school and otherwise have a vehicle available to her.

Ross worked one of three shifts, either starting at 8 a.m. and working until 4 p.m.; or 4 p.m. until midnight, or midnight until 8 a.m. When he worked the day shift, as he did at the time of trial, Paula and he would leave their house at 4:30 a.m. so he could be picked up at 4:45 a.m. for the ride to work.¹

Through the second week of December 1985, Ross earned an annual gross income of \$12,639.43 in wages, and \$2,194.00 in unemployment compensation benefits. With the \$170 the family received for fuel assistance to help pay for their heat, their total income for the year was \$15,003.43. The trial court found this to be at or near the poverty level, as established by guidelines used in North Dakota for the purpose of determining eligibility for various social assistance programs, based on a family of five.

For about five months in 1985, however, there were 7 to 9 people in their home as Paula's relatives who needed help came to live with them. These were people who were unemployed and thus could not contribute any income to the household. Nonetheless, Paula would feed and support them as though they were a part of the immediate family.

The Kadrmas family has few assets. They own no real estate. They own one pickup truck that has required many repairs during the school year. The other car they owned broke down during the year, was beyond repair, and was junked. Ross has 4 horses, one of which he was given when a child, two which are foals of the first, and one for which he paid \$100 some time earlier. He uses these on his

¹ Leaving their home three hours early rather than two was required because the oil field was in the Central Time Zone, their home in the Mountain Time Zone.

brothers' adjoining ranch to round up cattle. In return, his brothers allow him the use of grass and hay from the homestead, so that he does not have a feed expense in keeping the horses.

In past years the family agreed to pay the busing fee required to have Sarita ride the school bus and were able to pay it the first year. They fell behind, however, and were not able to stay current with this or other bills. They were heavily in debt and owed a total of \$13,000.00 at the time of trial, some of which had been turned over for collection, and owed back taxes as well. These bills were primarily for school loans, medical bills and charges they had made for gas and vehicle maintenance. They were not able to pay the busing fee for the 1984 school year and owed that as well.

According to Paula, who managed the money, the monthly income the family had was consumed by the time the family purchased the necessities of life. As their income varied with the amount of work available, in some months, they were not able to pay the monthly bills they accrued.

Prior to the beginning of the 1985 school year, Paula and Ross Kadrmas were tendered a contract to sign which would obligate them to pay \$97.00 for Sarita to be able to ride the bus. Upon receipt of the contract, Paula called the transportation officer, Richard Rykowsky, and asked whether her daughter Sarita could ride the bus if the family made partial payments, but did not sign the contract. She was told the contract must be signed. After discussion, the Kadrmas family decided the fee should not have to be paid and refused to sign the contract. Thereafter, the schoolbus, which drove through New Hradec, did not stop for Sarita.

North Dakota has long had a compulsory attendance law. N.D. Cent. Code 15-34.1-01. Parents who violate the compulsory attendance statute shall be prosecuted. N.D. Cent. Code 15-34.1-04. Conviction subjects a parent to a maximum fine of \$500 for a first offense, and up to 30 days imprisonment and a \$500 fine for a second offense within one year. N.D. Cent. Code 15-34.1-05, 12.1-32-01. In modern times prosecutions have, in fact, taken place when parents failed to get their children to school.

To get Sarita to school, Paula drove her, with the aid of a neighbor, Marsha Hall,² who had also refused to sign a contract. At the time of trial, the children were taken to school in the morning by Ms. Hall and picked up in the afternoon by Paula. Ms. Hall's jobs were at night (usually starting at 5:00 or 5:30 p.m.), so driving the children to school did not coincide with her work schedule. Likewise, whether picking the children up from school was convenient for Paula was dependent on Ross' work schedule.

Both families endured significant hardships in driving their children to school. Paula would not have made a trip to Dickinson each day unless she had been driving the children. Normally, she would have made one or two trips a week for shopping. Ms. Hall made daily trips to Dickinson to get to work, but as noted above, her work commute did not coincide with taking the children to school. Consequently, Ms. Hall also made one trip to Dickinson each day that she would not have otherwise made. The cost for gasoline for the Kadrmas four wheel drive pickup was

² Marsha Hall was a single mother of two children, Howard and Yvonne, both of whom attended school in Dickinson. She and her children were co-plaintiffs at the state level. Ms. Hall was found by the trial court to be "substantially below the poverty income level" (J.A. 46), even though she held down two jobs in Dickinson.

\$114 monthly. Marsha Hall had a more economical car and her gasoline cost was \$50 per month. Fuel expenses were in addition to normal wear and tear on the vehicles, and substantial repair expenses to the Kadrmas truck. At one point during the year, the truck engine had to be replaced, at a cost of \$800.00. The cost of driving the children was a substantial extra expense for both families which neither could afford.

B. District Busing Policy And State Statutes

North Dakota has two systems of providing transportation of its rural children to elementary and high school.

The first, and most generally applicable statute, Section 15-27.3-10 (1985 Supp.) N.D. Cent. Code, requires all reorganized school districts to provide free transportation to all children living two or more miles from school, or, as an alternative, to pay parents of such children a mileage fee to transport their children themselves. This statute and its predecessors have been in effect, in substantially the same form, since 1911.³

This scheme is in effect in about 80 percent of the state. Of the 311 districts in the state, 248 have reorganized and fall under this general transportation scheme.

In 1972, an exception to this general policy was created for those districts which had not yet reorganized. Section 15-34.2-06.1, N.D. Cent. Code permitted those non-reorganized districts to refrain from providing transportation altogether; it further allowed the districts to

³ Ch. 266, Sec. 232, 1911 Laws of North Dakota. Prior to that time, a school had to be built within two miles of any group of 9 students who petitioned the district. Ch. 62, Sec. 83, 1890 Laws of North Dakota.

charge a transportation fee if they did choose to provide school bus service to and from school.

The fee is limited in amount to the difference between the state transportation aid payment (per pupil) and the per-pupil cost of providing transportation.

The Dickinson School District has not reorganized. In 1973, following passage of Section 15-34.2-06.1, N.D. Cent. Code, authorizing imposition of transportation fees by non-reorganized districts, the Dickinson district created a transportation committee. That committee proposed the first fee schedule for busing.

The district had been providing free bus service prior to the passage of 15-34.2-06.1, N.D. Cent. Code, as had all districts in the state. Now, however, the majority of the busing patrons voted to expand the busing service by going door to door (as opposed to picking up students at the nearest public road), in exchange for the payment of the busing fee.

The 1985 Dickinson busing policy is set forth in full in the joint appendix (J.A. 22). In brief, it provides that the district will provide schoolbus service to all schools, public and parochial, to students who live farther than three miles from an elementary school or four miles from a high school. With the exception of special education and handicapped children, all riders must pay the fee, and all parents must sign a contract obligating them to payment of the fee before their children may ride the school bus. Although installment payments of the fee have been allowed, the fee has never been waived nor lowered because of a family's lack of income. The school was adamant that the contract be signed before the beginning of the year—which obligated the Kadrmas family to pay the full sum.

The fee is the same for all patrons, starting with \$97.00/year for one child, progressing to \$205.00/year for three children, and culminating with \$315.00/year for five or more children.

The requirement that a contract be signed as a precondition to busing was put in place for two reasons: 1) to help establish bus routes and 2) to come within the ruling of *Bismarck School District v. Walker*, 370 NW2d 565 (ND 1985). In the *Bismarck School District* case, the Bismarck District sued Mr. Walker in small claims court for delinquent busing fees he contractually agreed to pay for taking his children to school. He defended by challenging the constitutionality of the busing fee. The North Dakota Supreme Court held that because Mr. Walker voluntarily signed a contract agreeing to pay the busing fee, he waived any objection to the fee, even an objection to constitutionality. Thus, the Dickinson contract obligation was a way of deterring challenges to the busing fee.

The Dickinson school district lies in southwest North Dakota, in and around the city of Dickinson. With one exception, all schools in the district are in the city of Dickinson.⁴ The District measures seventeen miles by twenty-eight miles and the schools are situated such that a student could live as far as twenty-five miles from the school attended. Approximately 3300 children attend public schools in Dickinson. Most live within the three or four mile limits and are not bused; about 13% of them are bused to and from school.

The district spends \$312,000 per year for transporting students to and from school. Of this, \$244,000 is received

⁴ The Gladstone School is the only school located outside of the Dickinson city limits.

in state transportation aid payments, \$34,000 is paid from general revenues and \$34,000 is collected from families in busing fees.

The district also buses students to and from other school events, such as athletic competitions. This is done at no charge to the student, and the \$18,000 spent for busing athletes in 1985 is not included in the \$312,000 figure.

SUMMARY OF ARGUMENT

This is a case challenging a statutory barrier, erected by the State of North Dakota which poses a grave risk to the education of some, though not all, of North Dakota's poor children. The barrier comes in the form of a mandatory, non-waivable bus fee. Its impact is on poor families like those of the plaintiffs here, Paula and Sarita Kadrmas, who live in non-reorganized school districts. Eighty percent of the districts in the state are reorganized. All students in those districts, whether rich or poor, are provided bus transportation by the State free of charge. By state statute, only the 20 percent of North Dakota school districts that are "non-reorganized" are permitted to charge bus fees. For families in those districts, however, the fee is mandatory; it may not be waived, even if the parents are indigent.

Plaintiffs, living at the edge of poverty and heavily in debt, have challenged this inflexible bus fee under the Equal Protection Clause of the Fourteenth Amendment. They rely upon two separate strands of this Court's jurisprudence, either of which suffices to require reversal of the judgment of the court below. The first strand invokes this Court's traditional equal protection principles: it looks to the legislative distinction between reorganized and non-reorganized districts and asks whether the dis-

crimination imposed, based upon this distinction, offends the federal constitution.

In undertaking that analysis, plaintiffs have relied upon this Court's teaching in *Plyler v. Doe*, 457 U.S. 202 (1982), that although "[p]ublic education is not a 'right' granted to individuals by the Constitution . . . neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." 457 U.S. at 221.

North Dakota's constitution and statutes, in fact, reflect this Court's own judgment, affording education the status of a "fundamental right." Despite this state-created basis for the right, however, the Supreme Court of North Dakota reviewed the statutes challenged by plaintiff under a "traditional rational basis standard of review," *Kadrmas v. Dickinson Public Schools*, J.A. 53, reasoning that they touched "only" transportation of students and not education itself. As we will argue below, that distinction is without real meaning to those desperately poor families for whom a yearly bus fee can loom as a barrier to, or even as a denial of access to school.

Yet even employing a rational basis analysis, North Dakota's distinction is no more defensible than were the dwelling ordinances struck down in *Cleburn Living Center v. City of Cleburn* 473 U.S. 432, (1985), or the special preferences for long-time Alaskan residents sought to be defended by the State of Alaska in *Zobel v. Williams*, 457 U.S. 55 (1982). Put simply, the penalty imposed on parents in non-reorganized districts is not rationally related to the ostensible legislative end—to force reorganization—for at least three reasons: (1) it is overbroad in touching large school districts, such as Dickinson, that do not need reorganization to achieve an economically efficient size; (2) it purports to achieve its end by allowing an

onerous bus fee that is arbitrary in its very design; and (3) its actual burden falls disproportionately heavily upon an arbitrary sub-category of the State's poorest citizens who have the misfortune to live in non-reorganized districts.

This traditional Equal Protection analysis merges with the plaintiffs' second argument, drawn from the Due Process/Equal Protection line of cases beginning with *Griffin v. Illinois* 351 U.S. 12 (1956) and extending through *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Bearden v. Georgia* 461 U.S. 660 (1983). These cases teach that when a state creates an important benefit, especially one over which it holds an effective monopoly, it cannot burden access to that benefit in such a way as to effectively deny it to the poor. *Bearden* has recently set forth the factors which should guide such an analysis: (1) the nature of the interest affected, (2) the extent to which the interest is affected, (3) the rationality of the connection between the legislative purpose and its means, and (4) alternatives available to the government in achieving its purpose. 461 U.S. at 666-67. In this case, application of the *Bearden* factors demonstrates that North Dakota's statutes now under challenge work precisely the evil condemned in these cases. "Education is not merely a government benefit, but plays a fundamental role in maintaining the basic fabric of our society." *Plyler supra*, 457 U.S. at 221. The busing fee burdens the Kadrmases' right of access to school just as effectively as transcript fees burdened indigents access to appellate courts in *Griffin*. The rationality of the connection between the legislative goals and purpose is tenuous and granting a waiver to families such as the Kadrmases would deprive the school district of a minimal amount of revenue. Finally, viable alternatives are available to the present system of non-waivable busing fees.

Under either analysis, then, and especially when seen under both together, the North Dakota statutes, by

arbitrarily imposing a bus fee and by denying a waiver even to the minority of poor families for whom the fee poses an intolerable burden, violate principles firmly embedded in the Fourteenth Amendment.

ARGUMENT

I. STATE STATUTES AND POLICIES CHARGING A FEE IN SOME, BUT NOT ALL, SCHOOL DISTRICTS AS A PRE-CONDITION TO A CHILD'S RECEIPT OF STATE AND LOCAL BUSING BENEFITS VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Education Is An Important Individual Right And Plays A Fundamental Role In Society.

The special importance of education to an individual child and to our society and government is widely and readily acknowledged. Often quoted, perhaps, but not lessened by it are the words of *Brown v. Board of Education*:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it is a right which must be made available to all on equal terms." 347 U.S. 483, 493.

Its value has not diminished since *Brown* was decided. Education functions as "a most vital institution for the preservation of a democratic form of government," *Plyler v. Doe*, *supra*, 457 U.S. at 221. It acts "as a primary vehicle for transmitting the values on which our society rests," *Id.*, and "provides the basic tools by which individuals might lead economically productive lives." *Id.* In short, education continues to play "a fundamental role in maintaining the fabric of our society." *Id.*

North Dakota citizens, since the inception of their state, have accorded the training and education of their children the highest importance. Article VIII, Sec. 1, of the North Dakota Constitution, recognizing that "a high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government," directs the state legislature to make provision for the "establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota. . . ."

The North Dakota Supreme Court has repeatedly held that education is a fundamental right under the state constitution. *Anderson v. Breithbarth*, 245 NW 483 (ND 1932), *In the Interest of G.H.* 218 NW2d 441 (N.D. 1974). "So definite is this policy [of maintaining a free public school system] that attendance at schools is compulsory. . . . The policy is not to shut out a pupil, but [to] compel attendance." *Anderson*, *supra*, at 484.

This policy is reflected in the body of education law passed by the North Dakota legislature. School attendance in North Dakota has been compelled since 1911. Today, the failure of the child to attend school, subjects the parents of that child to a \$500 fine for a first offense,

and \$500 and a 30 day imprisonment for a second offense occurring within a year of the first.

The state invests heavily in its system of public schools. It annually appropriates 150 million dollars for education, in addition to the \$251 million expended by local districts. Of the total annual state budget, \$23 million is allocated to transportation of children to and from school, indicating clearly the integral role of busing in the state system of large districts and centralized schools.

B. The Dickinson Busing Fee, For Some, Acts As A Barrier To Minimum Access To Education.

Against this background, plaintiffs have argued the North Dakota system, in which children in 20% of the state's school districts are charged a busing fee, regardless of the ability to pay, while the children in the remaining 80% of North Dakota's school districts are bused free of charge, denies to some the equal protection of North Dakota's laws.

In evaluating equal protection claims, this Court has recognized that not all legislative classifications are the same; they affect a range of individual interests in differing manner and degree. The Court has developed a range of analyses, dependent upon the classification drawn, and the individual interests affected. Thus, it has been established that the existence of a "suspect" classification, such as race, or the infringement of a "fundamental" right, such as travel, gives rise to the highest level of scrutiny. Under the strict scrutiny analysis, there is rarely a classification that may be constitutionally imposed. See *Cleburne v. Cleburne Living Center*, *supra*, 473 U.S. at 440-42 for a discussion of the ranges of analysis.

Some rights, although not fundamental, play such an important societal role that they have given rise to a

heightened level of attention when their possible infringement is being considered.

Although education has never been declared a fundamental right, the Court acknowledged that neither is it a "governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, *supra*, at 221. In striking down the tuition fee Texas charged illegal aliens to attend its public schools, the Court recognized the great value of education. The Court showed its solicitude for education and looked with special care at the legislative classification created. The Court held that the interests Texas proffered for charging the fee were "wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Id.*, at 230. This level of care is entirely applicable here, where we are dealing with the infringement of a right treated as fundamental by the State.

This standard is appropriately more difficult to meet than the "rational basis" test used to analyze legislative classifications that do not affect rights or interests afforded heightened scrutiny. Yet, even the minimum test of a legislative classification requires that it have a legitimate purpose, and that its means be rationally related to its goal. *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Zobel v. Williams*, 457 U.S. 55 (1982).

In this case the fee charged in some North Dakota school districts to ride the school bus is a barrier similar in kind to the tuition fee charged in *Plyler*. For the poorest North Dakota families it is a precondition to ready access to the public school system. As the dissent in the North Dakota Supreme Court noted: "In a rural state like ours, it is clear that transportation is extremely important to education. Without transportation, some children would

be literally cut off from education." *Kadrmas v. Dickinson Public Schools*, (Levine, J., dissenting), J.A. 67. Even the majority of the North Dakota court, though holding transportation need not be provided free of charge, found that "No one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein." *Id.*, J.A. 60.

The North Dakota Supreme Court rejected the Kadrmas family's challenge, relying on *San Antonio Public School District v. Rodriguez*, 411 U.S. 1 (1973) for the proposition that the equal protection clause was not designed to protect against the harm caused by the busing fees. That reliance is misplaced. This is not a case, like *Rodriguez*, where the law assures all children equal access to a minimum education, and differences among districts due to finances are only of relative quality of education. Rather, this busing fee is more like the tuition fee in *Plyler* in that it is a precondition to access to a basic, minimum education. Acknowledging that Sarita Kadrmas' parents went through extraordinary efforts to get her to school—and to meet compulsory attendance laws—does not change the face of the busing statute, nor its natural tendency to create a barrier to access to the public school system, a barrier that does not exist in the vast majority of districts in the state.

This Court in *Plyler* did not require each student to show that the tuition fee was beyond any possible method of attainment before it struck it down. It was enough that the fee was unequally imposed, and presented a barrier to public school education. The North Dakota busing statute which is not applied in 80% of the districts permits a fee to be applied without waiver in the other 20%. This fee, although smaller in amount than the tuition in *Plyler*, is

not so minimal that it can be ignored. It is a substantial fee to those without the means to pay it.

In one sense, the fee here has less justification than in *Plyler*. As the dissent in *Plyler* noted, much of the impetus for enacting the tuition fee for illegal aliens was due to the federal government's failure to maintain its borders. Texas was, thus, at the mercy of events it could not control. No such consideration exists here.

The North Dakota fee should be subjected to the same careful review as in *Plyler*, and made to show that it furthers a substantial state goal.

C. The State Busing Scheme Bears No Rational Relationship To Any Ostensible State Interest.

Even if it is found that a rational basis analysis incorporates all proper considerations in the evaluation of this equal protection claim, the North Dakota courts erred in upholding the fee.

1. The Deference Given Due To A Concern For Local Autonomy Of School Districts Is Not Due A Classification Established For The Primary Purpose Of Distributing State Funds.

Their reliance on *Rodriguez* is improper in this context for yet another reason. As this Court noted in *Papasan v. Allain*, 106 S.Ct. 2932 (1986), the invocation of *Rodriguez* does not validate every part of every school's financial scheme. It merely allowed variations in the quality of education due to differences in local property tax bases.

In this case, as in *Papasan*, the issue is not one of local spending or control. The state has passed the statutes allowing the discriminate classifications, and school transportation is funded primarily by the state. Of the \$312,000

the Dickinson district spent for busing, \$68,000, or 21% was raised through local taxes and the busing fee; 79% of the money expended came directly from the state. It was just this kind of state expenditure or distribution the *Papasan* court found different than, and not controlled by *Rodriguez*.

We are not here challenging an overall educational financing scheme. What is before the Court is an unequal distribution of but one state fund.

2. There Is No Rational Justification For North Dakota To Withhold Free Busing Services From A Small Minority Of Its Elementary And High School Students.

When the concern for local autonomy is removed, the issue becomes one of discriminatory distribution of benefits the State has deemed important enough to create and distribute. This Court has recently shown that such distributions, under any meaningful standard of review, must not be withheld from some unless the State can put forth a rational basis for doing so. *Zobel v. Williams*, *supra*, 457 U.S. 55 (1982).

North Dakota has failed to justify denying busing to some of its students, or conditioning it upon payment of a fee.

a. It Is Irrational To Unequally Impose A Busing Fee In A Purported Effort To Force The Expansion Of North Dakota School Districts.

There are but two alleged justifications for the busing fee that reasonably may be drawn from this record. The first is that suggested by the North Dakota Supreme Court: "The obvious purpose of such legislation is to encourage school district reorganization with a con-

current tax base expansion and an enhanced and more effective school system." *Kadrmas, supra*, at J.A. 64.

Such broadly stated purposes may be of legitimate state interest. However, that the State attempts to achieve these goals by creating a burdensome and oppressive system from which people will seek to escape, indicates the irrationality of its approach.

At the heart of this challenge is the fact that North Dakota is punishing a group of students, who bear no responsibility for their status, nor have the means to change it, in an effort to coerce the district to reorganize and expand.

This method of holding people "hostage" may have something to justify it when one state is trying to influence the action of another, see *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), but note the dissent of Stevens, J., at 674-675, but it is absolutely indefensible and irrational when a state does it to its own school children.

This is particularly true when the State could legislate the change directly, without any coercion at all. The North Dakota school district system is entirely a creature of statute; there is nothing in the North Dakota Constitution which mandates the size or particular composition of the districts. Nothing in the North Dakota Constitution would prohibit statutory reorganization.

Secondly, if the purpose of the busing fee is to encourage school districts to consolidate and achieve economy of scale, it is irrational to apply that fee to a small minority of districts that include the eight largest school districts in the State. These are the districts that have already achieved economy of scale, and would be the ones, it seems, least in need of expansion.

The relationship between the busing statute and the goal of reorganizing school districts, if one can be seen at all, is so indirect and attenuated as to be almost non-existent. Such a relationship can not support the unequal treatment of the State's students. The scheme is particularly offensive when it may operate to deny them access to school altogether. This fact weighs heavily when considering whether the proposed goal of the statute transcends the potential harm to the class denied busing.

b. There Is No Fiscal Justification For The North Dakota Busing Fee That Is Legally Permissible Or Factually Supported.

The only other justification put forward for the busing fee is the state and district's interest in preserving its fisc. Of course, "concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources". *Plyler supra*, at 227 (citations omitted).

Although put forth in the argument, the record doesn't factually support the claimed need to preserve finances. It is clear from the deposition of Superintendent Julson that the school district could afford to operate the bus system in its current form, without cutting other services or raising additional revenue, even if the \$34,000 in fees were not available, let alone the \$6,200.00 in fees a waiver system might cost.⁵

Finally, the claimed need of the state to save money does nothing to explain why only some districts may

⁵ The 1987 United States Census Report indicates 18.2% of children in North Dakota are below the poverty level. Assuming an even distribution of population, 18.2% of the \$34,000 in busing fees might be waived, or \$6,188.00.

charge the fee, while the majority cannot. Nor does it explain the distinction between reorganized and non-reorganized districts.

II. THE DICKINSON BUSING FEE, APPLIED WITHOUT WAIVER, DEPRIVES SARITA KADRMAS OF MINIMUM ACCESS TO EDUCATION.

The busing fee takes on an equally invidious dimension when it is applied, as it is in the Dickinson district, without waiver to those unable to pay for it.

A. Certain Rights Provided By A State Are So Important That They May Not Be Withheld Completely From Those Unable To Pay For Them.

At least since 1956, this Court has consistently recognized that some rights or benefits a state provides its citizens, even if not themselves guaranteed by the federal Constitution, are nevertheless so important that they may not be withheld completely from those unable to pay a mandatory cost or fee. This has been true especially in those cases where the exercise of the right or benefit is compelled in some fashion, particularly if it is compelled by some state action. Generally speaking, the Court has isolated those rights that, without regard to their "fundamentality" under our constitution, are important to the fabric of our society. In *Griffin v. Illinois*, 351 U.S. 12, (1956), the Court held a criminal defendant's participation in a state-created system of appellate review, which had become an integral part of the state's criminal justice system, could not be denied to an indigent who lacked the funds with which to purchase a trial transcript.

Likewise, in *Smith v. Bennett*, 365 U.S. 708 (1961), the Court held that the state of Iowa could not condition the use of the writ of habeas corpus upon the payment of a four dollar filing fee. In so doing, the Court emphasized that

the right of habeas corpus was a traditional and very important right of citizens under our system of law.

In the 1970's, the Court held that marriage was of "basic importance" to our society, so much so that the state of Connecticut preemptively regulated its licensure and dissolution. Under those circumstances, a divorce filing fee of sixty dollars applied without a waiver, which acted to bar indigents from their only means to get a divorce, was invalidated. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

One year later, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court was confronted with a statute that required tenants appealing judgments of eviction to post a bond equal to two months rent, in addition to the normal undertaking required of all appellants. The Court struck down the statute, noting that double bond requirement imposed a heavy burden on all tenants seeking appeal, but that the effect on the poor was "particularly obvious," essentially preventing their access to the appellate system. 405 U.S. at 79.

In *Little v. Streater*, 452 U.S. 1, (1981), this Court held that blood tests could not be withheld from putative fathers who could not afford to pay for them in actions to establish paternity, where the state played a major part in the prosecution of the action (as assignee of child support benefits), thereby making the blood test necessary as a very important piece of exculpatory evidence. In that context, the Court invalidated a statute which provided for blood tests in paternity actions, to be paid at each party's own expense.

B. The Factors This Court Set Forth In *Bearden v. Georgia* Demonstrates That Busing Students To School Is A Right That May Not Be Withheld From The Indigent.

The Court has suggested that the federal Constitutional principles used in these cases are drawn from both

due process and equal protection. Recently, in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court, per O'Connor, J., suggested that "[d]ue process and equal protection principles converge. . . .". 461 U.S. at 665. This may account for the fact that *Boddie* was decided on due process grounds, although the concurring Justices found the basis of the decision in the equal protection clause. *Lindsey* was decided on equal protection grounds, as was *Smith v. Bennett*.

In *Bearden*, the Court suggested that the same principles are termed due process in the context of a criminal action, and equal protection in the context of a civil proceeding. In striking down, on equal protection grounds, a statute under which a person's probation could be revoked for failure to pay restitution, without a showing that the probationer had the ability to pay, the Court in *Bearden* noted that, whichever analysis is used, four factors should be considered in testing the constitutionality of statutes which limit the access of the indigent to particularly important rights or interests: 1) The nature of the interest affected, 2) the extent to which the interest is affected, 3) the rationality of connection between the legislative purpose and its means, and 4) alternatives available to the government in achieving its purpose.

This framework serves, not only to reconcile this Court's cases, but also to show that, when applied to the facts of this case, the principles enunciated by this Court in *Bearden* require invalidation of the North Dakota busing statute and policy.

1. The nature of education is basic to society.

The importance of the interest being affected is a dominant factor in this analysis. It is the basis for the height-

ened scrutiny given fundamental rights or very important rights, under traditional equal protection analysis.⁶

In this case, it is clear that education, and access to it, is a very important societal right. North Dakota views it as fundamental. This Court, in *Plyler*, has noted its importance to the fabric of our society, and has suggested that it is of constitutional significance. See also *Papasan v. Allain, supra*. Furthermore, participation in the educational process is compelled by criminal sanction. Because of these factors, North Dakota has created a system in which children, who live beyond certain limits, are bused to the school they attend. Surely, the interest they and their families have in this benefit is of the type this Court has protected from denial to those unable to pay the required fee.

2. The busing fee withholds from the poorest of North Dakotans minimum access to education.

This Court has made clear, in different contexts, that a person must be given minimal access to a given right, but, beyond that, differences in quality or degree are permissible. The distinction is the basic one between *Rodriguez* and *Plyler*, as it is applied in the education context.

The North Dakota busing fee is very much like the tuition fee in *Plyler*. Failure to agree to pay the busing fee

⁶ It also serves to distinguish cases such as *Little* and *Boddie* from cases such as *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973); and *Ross v. Moffit*, 417 U.S. 600 (1974). The Court in *Little*, in fact, noted the "fundamental" character of the interests involved there, comparing the paternity interest to the marriage interest in *Boddie*, calling it constitutionally "significant," and contrasting the lesser interest involved in *Kras*.

precludes access to the busing system altogether. The deprivation is total, not relative.

When one considers the Kadrmas family, and their extremely limited means, the busing fee stands as a barrier to the entire educational process. As their experience during the school year in question illustrates so graphically, they simply cannot continue to transport their children themselves. The great expense they incurred, the debt they accumulated and the necessities that were foregone could occur only because of the twin forces of compulsory education, with its threat of criminal prosecution, and North Dakota case law, which prohibited them from signing a busing contract if they sought to challenge the busing fee. They simply had no choice but to transport their child themselves, but it is obvious they could not be expected to continue.

Nor do they have the ability to pay the multiple busing fees that will be required of them, in varying amounts up to \$205.00 until 2002, the year the youngest of their three children graduates from high school. The evidence was clear that they were not even able to keep up with a single fee for more than one year or two, at the most.

For this family, which exists largely on the income it is able to produce in a withering economy, any busing fee extracted from them will come from the money used for food, or winter coats, or propane. It will not be a minor irritant; it will be a real and substantial deprivation.

The district has argued that this fee is minor, that it is a "good deal." This ignores the reality of the Kadrmas family, and of their extremely limited means. It is not a good deal to someone who cannot afford to pay it. The measure of the invidiousness of the fee is not whether other methods are more burdensome. A four dollar fee for release

from prison—the filing fee at stake in *Smith v. Bennett*—is a "good deal" in that sense, but this Court viewed the fee for what it was: a barrier to all the benefits the state is providing to others able to pay the fee without consequence.

3. **The busing fee has little or no rational connection to any legitimate state purpose.**

The tenuous relationship between the busing fee and the goal ascribed to it, namely, forcing reorganization of districts, has been previously discussed and will not be repeated here. The lack of a waiver provision in the busing fee policy is equally irrational. The income that would be lost is minimal, when viewed from the district's perspective. Only 18% of North Dakota's children are at a level equal or lower than the Kadrmas income level. Using that as a basis for waiver, the cost to the district in lost fees would be less than \$6,200. The actual cost to transport eligible children free of charge is even less: the bus routes are established; the route went right by the door of the Hall family, and within one-quarter mile of the Kadrmas house. Little expense could be anticipated in stopping for these children.

4. **There are many viable alternatives to non-waivable busing fees the State could use that would not harm the poor.**

The state and district have many viable alternatives to this system of busing fees applied without waiver that would accommodate their interest and all children's as well.

If their interest is to cause districts to achieve economy of scale by reorganizing, they could simply legislate the change, at no cost to individual families.

The state could simply provide busing free of charge for all, as it does in 80% of the school districts. There appears no reason of record why that system could not be extended to the entire state; in fact, that was the case for over half a century in North Dakota.

The record indicates that the Dickinson district has sufficient financial flexibility to permit a system of busing fees that includes a waiver for those unable to pay the fee. Superintendent Julson testified that the district is taxing at 62 mills, when a level of 80 mills is permissible under law. (Deposition of Julson, p. 7). The district buses athletes to competition for free and pays \$18,000 per year from general revenues to do so. Surely, this indicates that the district could, with relative ease, fund a \$6,200 waiver system that would afford all children, rich or poor, a ride to school.

The Dickinson district could revert to the system it had before busing fees were established, and that is, for those unable to pay the fee, service could be provided to the nearest public road, instead of to the patron's door. This is the way the system worked before the door to door service was established as an additional benefit given for the imposition of a fee. It is difficult to see the disadvantage to either the state or the district in such a system, and it is one that would go a long way to accommodate the interest the Kadrmas family has in obtaining an education on a relatively equal basis with other families of the district.

The busing statute and fee cannot be sustained under either branch of the Court's reasoning: either as applied to differences between districts, or to differences within a district. The fees unfairly burden low-income families living in non-reorganized districts, which deprives them of access to a minimum level of education. Deprivation of

access to education is impermissible under the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, the judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

EDWARD B. REINHARDT, JR.
Counsel of Record
 North Dakota Legal Services, Inc.
 P.O. Box 217
 New Town, North Dakota 58763
 (701) 627-4719

DUANE HOUEK
 Legal Assistance of North Dakota
 P.O. Box 1893
 Bismarck, North Dakota 58502-1893
 (701) 222-2110
Counsel for Appellants

MOTION

1
No. 86-7113

Supreme Court, U.S.
FILED

DEC 18 1987

JOSEPH F. SPANGL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor
by her next friend, Paula Kadrmas,

Appellants,

v.

DICKINSON PUBLIC SCHOOLS, ROSS JULSON, in
his capacity as Superintendent of the Dickinson Public
Schools; CLARENCE STORSETH, NANCY JOHN-
SON, MERRY JOHNSTON, HAROLD KRIEG, HERB
HERAUF, in their capacity as members of the Dickin-
son School Board; RICHARD RYKOWSKY, in his ca-
pacity as Transportation Supervisor of the Dickinson
Public Schools,

Appellees.

**ON APPEAL FROM THE SUPREME COURT
OF NORTH DAKOTA**

MOTION TO DISMISS APPEAL

GEORGE T. DYNES
FREED, DYNES, REICHERT
& BURESH, P.C.
34 East First Street,
P.O. Drawer K
Dickinson, ND 58602-8305
(701) 225-6711

Counsel for Appellees

December 18, 1987

TABLE OF AUTHORITIES

	Page
<i>Bismarck Public Schools v. Walker</i> , 370 N.W.2d 565 (1985) _____	3
<i>Fahy v. Mallonee</i> , 332 U.S. 245 (1947) _____	3
<i>Hess v. Mulloney</i> , 213 F.2d 635 (9th Cir. 1954) _____	3
<i>Hulne v. International Harvester Company</i> , 496 F.Supp. 849 (1980) _____	3
<i>Kadrmas v. Dickinson Public Schools</i> , 402 N.W.2d 897 (1987) _____	1
<i>Strickland v. Flue-Cured Tobacco Co-op Stabilization Corporation</i> , 643 F.Supp. 310 (D.C.S.C. 1986) —	3

**MOTION TO DISMISS APPEAL
AND SUPPORTING BRIEF**

The Appellees request that the Court dismiss this appeal forthwith for the reason that the Appellants have voluntarily accepted the benefits of the statutes and policies which they contend on this appeal to be unconstitutional. That the well settled law is that a party is estopped from questioning the constitutionality of an act while at the same time retaining the benefits therefrom.

As established by the Affidavit of Richard Rykowsky, dated December 15, 1987, and attached hereto, Paula Kadrmas, on behalf of her minor daughter, Sarita Kadrmas, has recently signed two separate agreements and has paid fees to the Dickinson Public School District for the daily transportation of Sarita. Sarita has been continuously enjoying the benefits of such bus service since April 6, 1987, and continues to accept daily bus service from home to school and return, pursuant to the contracts signed by Paula Kadrmas, in accordance with 15-34.2-06.1, NDCC (the statute which is under constitutional attack on this appeal) and in accordance with the policies of the Dickinson School District adopted and executed pursuant to said statute.

In view of this recent development, which occurred after the final rendition of the opinion of the Supreme Court of the State of North Dakota, in *Kadrmas v. Dickinson Public Schools*, 402 N.W.2d 897, which decision was issued March 26, 1987, the Appellants are now estopped from pursuing their constitutional attack and this appeal should be dismissed.

Throughout the course of the controversy between these parties in the North Dakota Courts, the Appellants refused to sign any contract for busing services and refused to make any payment of the contested fee. The recent acceptance of all benefits available under the contested statute and policies, as indicated by the Richard Rykowski Affidavit and the exhibits attached thereto, occurred prior to the issuance of the Jurisdictional Statement by counsel for the Appellants by which they initiated this appeal on June 19, 1987.

In each of the separate contracts signed by Paula Kadrmas, one for the last portion of the 1986-87 school year and one for the present school year of 1987-88, she has agreed to pay the annual bus fee of \$97.00 for the transportation of her daughter, Sarita. There is no controversy which justifies the continuation of this litigation.

The undersigned was not informed of the signing of said contracts and the payment of fees by Paula Kadrmas, until December 3, 1987. If this information had been available earlier, the substance of this motion to dismiss would have been incorporated in our initial motion to dismiss dated July 17, 1987.

THE APPLICABLE LAW

It is well established that one may not retain benefits of an act while attacking the constitutionality of the same act. The courts will not pass upon the constitutionality of a statute at the instance of one who has availed him-

self of its benefits. *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Hess v. Mullaney*, 213 F.2d 635 (9th Cir. 1954); *Strickland v. Flue-Cured Tobacco Co-op Stabilization Corporation*, 643 F.Supp. 310 (D.C.S.C. 1986).

The general rule is stated in *Strickland, supra*, at page 319:

"It is an elementary rule of constitutional law that one may not retain the benefits of the act while attacking the constitutionality of one of its important conditions."

Sarita Kadrmas has been receiving the benefits of bus transportation, for the payment of a nominal fee, and may not now be heard to complain that the statute and policy that provide for the charging of that fee are unconstitutional.

This same rule has been applied in the federal courts of North Dakota, as indicated in *Hulne v. International Harvester Company*, 496 F.Supp. 849 (1980), at page 853:

"Generally a party who takes advantage of the provisions of a law cannot question its constitutionality."

The present situation, which we address with this motion to dismiss, was duplicated in the 1985 North Dakota Supreme Court decision of *Bismarck Public Schools v. Walker*, 370 N.W.2d 565. In that case, Walker, who incidentally was represented by the same attorneys that appear in this case for the Appellants, contested the constitutionality of the same North Dakota statute (15-34.2-06.1, NDCC), but had signed a contract with the Bismarck School District agreeing to pay the requisite fee, which in that case was \$315.00 for the year. The North Dakota

Supreme Court refused to hear the constitutional issue on grounds of estoppel and affirmed the lower court decision which found Walker responsible for the payment of the stipulated fee.

Following the rendition of the opinion in *Walker, supra*, the instant case was initiated and Paula Kadrmas refused to sign a contract and refused to pay any fees, thereby maintaining her standing to raise the constitutional issues which were presented to the North Dakota courts. However, upon the final decision by the North Dakota Supreme Court, Paula Kadrmas, by signing the contracts and paying the fees, has precluded her right to maintain this appeal on constitutional grounds.

We request that the Court dismiss the appeal without further proceedings.

Dated this 18th day of December, 1987.

Respectfully submitted,

FREED, DYNES, REICHERT
& BURESH, P.C.

Attorneys for Appellees
34 East First Street, P.O. Drawer K
Dickinson, ND 58602-8305

By _____
George T. Dynes

AFFIDAVIT OF RICHARD RYKOWSKY

STATE OF NORTH DAKOTA))
COUNTY OF STARK) ss.

RICHARD RYKOWSKY, being first duly sworn, deposes and says as follows:

That he is the Transportation Supervisor of the Dickinson Public Schools, is one of the Appellees above named, and makes this affidavit on behalf of all of the Appellees.

That on April 6, 1987, Paula Kadrmas, on behalf of her daughter, Sarita Kadrmas, signed a contract for transportation with the Dickinson Public School District, which contract includes the promise to pay the stipulated fee of \$97.00 per annum for transportation services. That the applicable fee for the fractional school year to the end of school in May, 1987, was \$21.56 based on the full annual fee of \$97.00. That attached hereto as Exhibit "A" is a copy of said contract which was applicable for the final portion of the 1986-87 school year. Also attached hereto as Exhibit "B" is a copy of the receipt showing a payment of \$10.00 at that time by Paula Kadrmas toward the transportation fee.

Subsequently, prior to the 1987-88 school year, Paula Kadrmas signed another contract by which she agreed to pay the usual \$97.00 annual transportation fee for transportation services to be given Sarita Kadrmas during the school year. That attached hereto as Exhibit "C" is a copy of said contract which is currently in effect. Also attached hereto as Exhibit "D" is a receipt showing payment on August 18, 1987, of \$50.00 toward the annual fee.

App. 2

That ever since April 6, 1987, Paula Kadrmas and her daughter, Sarita Kadrmas, have enjoyed the benefits of the bus transportation system offered by the Dickinson Public School District, and they have in all respects adhered to the existing policies concerning the commitment to pay a fee for the enjoyment of such services. That all policies now in effect are the same as those in effect in the 1985-86 school year, including the requirement of the same contract and the payment of the same annual busing fee.

Dated this 15th day of December, 1987.

/s/ Richard Rykowski
Richard Rykowski

Subscribed and sworn to before me this 15th day of December, 1987.

/s/ George T. Dynes
George T. Dynes, Notary Public
Stark County, North Dakota
My Commission Expires: 9/22/92

(SEAL)

App. 3

EXHIBIT A

**DICKINSON PUBLIC SCHOOLS
TRANSPORTATION AGREEMENT**

This form represents a legal and binding contract between the Dickinson Public School District #1 and the party whose signature appears below.

The School District will provide bus transportation for school-aged children from their residence to school and return or as agreed upon. The bus fee will apply to all children bused, public or parochial. The bus fee is due and payable at registration time unless prior arrangements are approved through the administration office. Board policy on busing will apply to all families. *Signed forms must be returned to Dickinson Public Schools by August 1, 1986 at P.O. Box 1057, Dickinson, North Dakota, 58602-1057.*

I fully understand this Agreement and do hereby agree to the busing fee as follows:

One child	\$ 97.00	
Two children	\$150.00	\$21.56
Three children	\$205.00	April 6 to End
Four children	\$260.00	of Year 1987
Five children or more	\$315.00	

This fee is for the entire school year. One-way rides (a.m. or p.m.) will be one-half of the fee shown. Kindergarten fees will be one-half of the fee shown.

I will have 1 child(ren) on the school bus for the 1986-87 school term. I agree to pay the bus fee as applicable. (Please fill in the number of children to be bused and busing schedule which applies.)

App. 4

My child/children will ride a.m. and p.m. X

just a.m. _____

just p.m. _____

Please note on the form if you will have Kindergarten child/children riding on the school bus.

Kindergarten? Yes or No

/s/ Paula Kadrmas
(Signature)

Please note: THIS FORM MUST BE RETURNED BEFORE BUS SERVICE WILL BE PROVIDED.

App. 5

EXHIBIT B

RECEIPT Date April 6, 1987 No. 2486

Received from Ross Kadrmas (Paula)

Address _____

For Bus Fee 1986-87

on April 6, 1987

ACCOUNT		HOW PAID	1 child
Amt. of		Cash	10.00
Account	21.56	Check	
Amt. Paid	10.00	Money	
Balance		Order	
Due	11.56		

By Richard Rykowski

EXHIBIT C**DICKINSON PUBLIC SCHOOLS
TRANSPORTATION AGREEMENT**

This form represents a legal and binding contract between the Dickinson Public School District #1 and the party whose signature appears below.

The School District will provide bus transportation for school-aged children from their residence to school and return or as agreed upon. The bus fee will apply to all children bused, public or parochial. The bus fee is due and payable at registration time unless prior arrangements are approved through the administration office. Board policy on busing will apply to all families. *Signed forms must be returned to Dickinson Public Schools by August 1, 1987 at P.O. Box 1057, Dickinson, North Dakota, 58602-1057.*

I fully understand this Agreement and do hereby agree to the busing fee as follows:

One child	\$97.00
Two children	\$150.00
Three children	\$205.00
Four children	\$260.00
Five children or more	\$315.00

This fee is for the entire school year. One-way rides (a.m. or p.m.) will be one-half of the fee shown. Kindergarten fees will be one-half of the fee shown.

I will have 1 children on the school bus for the 1987-88 school term. I agree to pay the bus fee as applicable. (Please fill in the number of children to be bused and busing schedule which applies).

My child/children will ride a.m. and p.m. ☒ _____
just a.m. _____
just p.m. _____

Please note on the form if you will have Kindergarten child/children riding on the school bus.

Kindergarten? _____ Yes or _____ No

Signature
Address

Paula Kadrmas
Rt 3 Box 30
Dickinson, N.D.

Please note: THIS FORM MUST BE RETURNED BEFORE BUS SERVICE WILL BE PROVIDED.

App. 8

EXHIBIT D

RECEIPT

Date Aug 18 1987 No. 2581

Received from Ross Kadrnas

Address

Dollars \$50.00

For Bus Fee 1986-87

ACCOUNT

Amt. of		HOW PAID
Account,	108.56	Cash
Amt. Paid	50.00	Cheek
Balance		Money
Due	58.56	Order

By Richard Rykowski

App. 9

STATE OF NORTH DAKOTA)

38.

COUNTY OF STARK

AFFIDAVIT OF SERVICE BY MAIL

SONJA KOVASH, being first duly sworn, deposes and says that on the 18th day of December, 1987, she served the attached

MOTION TO DISMISS

0193081

Edward B. Reinhardt, Jr.

Duane Houdek

by placing a true and correct copy thereof in an envelope addressed as follows:

Edward B. Reinhardt, Jr.
North Dakota Legal Services,
Inc.
P.O. Box 217
New Town, ND 58763

Duane Houdek
Legal Assistance of
North Dakota
P.O. Box 1893
Bismarck, ND 58502

and depositing the same, with postage prepaid, in the United States mail at Dickinson, North Dakota.

/s/ Sonja Kovash
Sonja Kovash

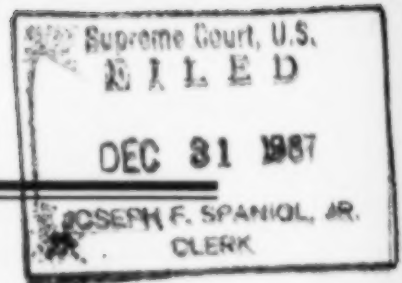
Subscribed and sworn to before me this 18th day of
December, 1987.

(SEAL)

/s/ Luella B. Abel
Luella B. Abel, Notary Public
Stark County, North Dakota
My Commission Expires: 7/28/90

MOTION

6
No. 86-7113



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

PAULA KADRMAS and SARITA KADRMAS,
a minor by her next friend, Paula Kadrmass,
Appellants,

v.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his capacity as Superintendent of the Dickinson Public Schools; CLARENCE STORSETH, NANCY JOHNSON, MERRY JONHSTON, HAROLD KRIEG, HERB HERAUF, in their capacity as members of the Dickinson School Board; RICHARD RYKOWSKY, in his capacity as Transportation Supervisor of the Dickinson Public Schools,
Appellees.

On Appeal From The Supreme Court Of North Dakota

RESPONSE TO MOTION TO DISMISS

EDWARD B. REINHARDT, JR.
Counsel of Record
North Dakota Legal Services, Inc.
P.O. Box 217
New Town, North Dakota 58763
(701) 627-4719
DUANE HOUDEK
Legal Assistance of North Dakota
P.O. Box 1893
Bismarck, North Dakota 58502-1893
(701) 222-2110
Counsel for Appellants

TABLE OF CONTENTS

	Page
INTRODUCTION	1
A. The Doctrince Of Estoppel Does Not Apply In This Type Of Case	2
B. Placing Sarita Kadrmas On The School Bus Was Not A Voluntary Action, But Was Compelled By The Family's Circumstances	3
AFFIDAVIT OF PAULA KADRMAS	1a

TABLE OF AUTHORITIES

Cases:	
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	3
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 288 (1936)	2
<i>Buck v. Kuykendall</i> , 267 U.S. 307 (19)	1
<i>Fahey v. Mallonee</i> , 332 U.S. 245 (1947)	1, 2
<i>Goldberg v. Kelley</i> , 397 U.S. 254 (1970)	3
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	3
<i>Little v. Streater</i> , 452 U.S. 1 (1981)	3

In its motion to dismiss this appeal, the Dickinson School District has cited one case from this Court, *Fahey v. Mallonee* 332 U.S. 245 (1947), purporting to stand for the "general rule" that one may not retain the benefits of an act while challenging its constitutionality. *Motion to Dismiss* at 2, 3. Because Sarita Kadrmas rode the schoolbus for one month in 1986-87 and for the current 1987-88 school year, the argument made is that she may not challenge the fee she must pay although indigent, nor may she challenge the scheme that provides free busing to the vast majority of districts in the state, but denies it to her because she happens to live in a district that has chosen not to reorganize.

There are two major reasons why application of this particular doctrine of estoppel is inappropriate in this case: First, far from being a rule of general applicability, it is a narrow, exceptional rule that appears to have emanated from cases involving challenges to parts of enabling legislation by entities given life or special privilege by the statute they challenge. It further appears to be confined, in the main, to such situations; it has not been applied to cases like this where an individual seeks to obtain benefits made generally available to all and denied to the individual only because of a prohibitive fee or an exclusionary legislative classification.

Secondly, like other strains of estoppel or waiver, the doctrine is applied, if at all, only when there is a clearly voluntary act that is inconsistent with a constitutional challenge—an act free from any form of compulsion. *See, e.g., Buck v. Kuykendall*, 267 U.S. 307. The element of voluntariness is missing here. As a review of the attached affidavit of Paula Kadrmas will indicate, the Kadrmas family, compelled by law to get their child to school, and left with no viable means to do so on their own, relented and put their child on the schoolbus, signing the fee contract the district required them to sign.

A. The Doctrine of Estoppel Does Not Apply in This Type of Case.

The one decision of this Court cited by the Dickinson School District, *Fahey v. Mallonee*, suggests the inapplicability of its doctrine of estoppel to this case.

Fahey involved a constitutional challenge to one subsection of the Home Owners' Loan Act of 1933 by a federal savings and loan organized under another subsection of the Act. The savings and loan sought to have invalidated the process by which a conservator is appointed, while retaining all other benefits of operating as a federal savings and loan.

The Court disallowed the challenge, stating:

"It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations and that the court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions." *Fahey v. Mallonee*, *supra*, at 256.

The estoppel cases cited in *Fahey* and others decided since are similarly rooted in facts that include special privilege being granted to the individual or organization by the act they challenge. Thus, it was urged that the Tennessee Valley Authority should not be able to challenge a part of the statute under which it was created. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). A plurality of this Court held a government employee could not question the procedures employed in determining the extent of a

granted substantive right. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Even within this limited sphere of operation, the doctrine has not been uniformly applied. As noted in a plurality opinion:

"This doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach. *Arnett v. Kennedy*, *supra*, at 153.

There is little to recommend the expansion of the doctrine to cases such as this, where the Kadrmas' family is neither seeking nor accepting any special privilege, but only trying to obtain that which is broadly and generally given to all in a vast majority of school districts of the state: transportation to school. The statute they challenge grants no special privilege; in fact, it puts the Kadrmas family and those like them at a severe disadvantage by charging a fee to bus their children. They question that busing fee, imposed without waiver, in the same manner as the plaintiff challenged blood tests conditioned upon payment of a fee, *Little v. Streater*, 452 U.S. 1 (1981); and in the same manner as the plaintiff challenged the transcript fee in *Griffin v. Illinois*, 351 U.S. 12 (1956).

This court has not applied the doctrine of estoppel in these cases, nor in numerous constitutional challenges to parts of statutory schemes granting welfare benefits. See e.g. *Goldberg v. Kelley* 397 U.S. 254 (1970). Similarly, the doctrine of estoppel has no application in this case.

B. Placing Sarita Kadrmas on the School Bus Was Not a Voluntary Action, But Was Compelled by the Family's Circumstances.

Even if it could be said that estoppel could apply in this type of case, the facts do not support a voluntary retention of benefits on the part of the Kadrmas family.

Throughout this case, the family has struggled in a system that compels school attendance on one hand and withholds from them access to the school busing system on the other. They had managed, despite a poverty level income, to drive Sarita the 16 miles to school and 16 miles home every day, only through great sacrifice and the assistance of a neighbor similarly situated. Now, however, the neighbor has moved out of state, and the situation of the Kadrmas family has changed drastically.

Their income at the time of trial, while Ross Kadrmas worked in the oil fields, was about \$15,000 per year for a family of five. Since then, as Paula's attached affidavit shows, this income has been reduced to \$500 - \$600 per month. They are now earning not even half of the poverty level for a family of five, even though they work full time at trying to establish a ranching operation.

Additionally, Paula, who always drove Sarita to school while Ross worked, overturned their only vehicle on an icy road in March of 1986. She was hospitalized for over a week and laid up for two months thereafter. As she states in her affidavit, the family simply had no choice but to place Sarita on the bus.

The school district, as has been its policy throughout, demanded that the family sign a contract promising to pay the busing fee before Sarita would be allowed to ride on the schoolbus.

This combination of circumstances hardly makes the use of the schoolbus system a "voluntary" acceptance of benefits.

To the contrary, the compulsion of the mandatory attendance laws, which has loomed throughout the case, now applied to this family with the barest of means and the

inability to drive their child to school themselves, has finally left them no option.

This is not the type of situation where they ought to be estopped from maintaining their constitutional challenge.

For these reasons, the appellants request that the motion to be dismissed be denied.

Respectfully submitted,

EDWARD B. REINHARDT, JR.

Counsel of Record

North Dakota Legal Services, Inc.

P.O. Box 217

New Town, North Dakota 58763

(701) 627-4719

DUANE HOUDEK

Legal Assistance of North Dakota

P.O. Box 1893

Bismarck, North Dakota 58502-1893

(701) 222-2110

Counsel for Appellants

APPENDIX

AFFIDAVIT OF PAULA KADRMAS

1. My daughter, Sarita, and I are the appellants in *Kadrmass v. Dickinson Public Schools*, No. 86-7113.

2. I signed an agreement with the Dickinson Public Schools to have Sarita bused to school the last month of the 1986-87 school year and again for the 1987-88 school year only because neither my husband nor I could continue to drive her to school ourselves, not because we no longer wish to continue our challenge of the busing fees.

3. I signed the contract, believing it would not affect the case we started, because we simply could not continue to drive Sarita to school and yet had to get her to school, for her own good, and because we could be prosecuted for not complying with the compulsory attendance law.

4. About three weeks prior to signing the busing contract in April of 1986, the truck I was driving, with my children as passengers, overturned on an icy road near Dickinson, and was wrecked beyond repair.

My children were not hurt, but I was hospitalized for over a week, and laid up with an injured back for about two months. During this time I could not easily get in and out of a vehicle, and couldn't drive Sarita to school every day.

5. Also, our family income decreased from the \$15,000 we made in 1985, and driving the two sixteen mile round trips into Dickinson to take Sarita to and from school was harder to finance.

6. Our income in the first half of the 1986-87 school year was limited to \$500 per month that my husband, Ross, earned as a farm-hand, working for his brothers.

7. In January of 1987, Ross' brothers no longer had work for him, and our income has been as follows:

January-February	\$660.00 in unemployment compensation for Ross
March	\$495.00 in unemployment compensation

for Ross (At this point, Ross used all the unemployment benefits he earned).

April \$500.00 in disability benefits through AFDC because of my back injury

May \$500.00 in AFDC disability benefits

8. In June of 1987 FmHA approved a loan for us, so we could try to farm some land we leased from Ross' father. In our borrowing plan, we projected we could live on \$10,000 from June of 1987 until the spring of 1988 when the first cattle could be sold. However, \$4,000 of the money we counted on was a crop support payment on the land that went to Ross' father and was spent. We were left with \$6,000 to live on for that time period.

9. Our debt has increased because of the farm loans. We owe FmHA \$8,000 for an operating loan, and \$57,000 for a cattle loan to start a herd. Our payments, if cattle prices are right in the spring, will take all proceeds from the cattle sales, except for the amount we can apply to our \$6,000 for living expenses.

/s/ Paula Kadrmas

PAULA KADRMAS

Date: 12-23-87

Subscribed and sworn to before me on the 23rd day of December 1987.

/s/ James P. Fitzsimmons

JAMES P. FITZSIMMONS

Notary Public

APPELLEE'S BRIEF

No. 86-7113

In The
Supreme Court of the United States
October Term, 1987

PAULA KADRMAS and SARITA KADRMAS a
minor by her next friend, Paula Kadrmas,

Appellants,

v.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON,
in his capacity as Superintendent of the Dickinson Public
Schools; CLARENCE STORSETH, NANCY JOHNSON,
MERRY JOHNSTON, HAROLD KRIEG, HERB
HERAUF, in their capacity as members of the Dickinson
School Board; RICHARD RYKOWSKY, in his capacity
as Transportation Supervisor of the Dickinson Public
Schools,

Appellees.

**ON APPEAL FROM THE
SUPREME COURT OF NORTH DAKOTA**

BRIEF FOR THE APPELLEES

GEORGE T. DYNES
FREED, DYNES, REICHERT & BURESH, P.C.
34 East First Street, P.O. Drawer K
Dickinson, ND 58602-8305
(701) 225-6711

Counsel for Appellees

38 P2

QUESTIONS PRESENTED

1. Since the statute permitting charging a bus fee applies to non-reorganized districts only, does it violate the equal protection clause?

2. Did the application of the busing fee by the Dickinson District deprive Sarita Kadrmas of equal protection of the laws?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	17
ARGUMENT	21
I. SINCE THE STATUTE PERMITTING CHARGING A BUS FEE APPLIES TO NON-REORGANIZED DISTRICTS ONLY, DOES IT VIOLATE THE EQUAL PRO- TECTION CLAUSE?	21
II. DID THE APPLICATION OF THE BUS- ING FEE BY THE DICKINSON DIS- TRICT DEPRIVE SARITA KADRMAS OF EQUAL PROTECTION OF THE LAWS?	25
MOTION TO DISMISS—MOOTNESS	32
CONCLUSION	33

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bismarck Public Schools v. Walker</i> , 370 N.W.2d 565 (ND 1985)	25
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	18, 26, 27, 28, 29
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	18, 26, 27
<i>Kadrmass v. Dickinson Public Schools</i> , 402 N.W.2d 897 (1987)	13
<i>Little v. Streater</i> , 452 U.S. 1 (1981)	18, 26, 27
<i>Ortwein v. Schwab</i> , 410 U.S. 656, 93 S.Ct. 1172 (1973)	28, 29
<i>Papasan v. Allain</i> , 106 S.Ct. 2932 (1986)	30, 31
<i>Plyler v. Doe</i> , 457 U.S. 202, 102 S.Ct. 2382 (1982)	24, 25
<i>San Antonio Independent School District v. Rod- riguez</i> , 411 U.S. 1, 93 S.Ct. 1278 (1973)	24, 27, 30
<i>Smith v. Bennett</i> , 365 U.S. 708 (1961)	26, 27
<i>United States v. Kras</i> , 409 U.S. 434, 93 S.Ct. 631 (1973)	28
CONSTITUTIONAL PROVISIONS	
<i>North Dakota Constitution</i> Article VIII, Section 2	13, 22
STATUTES	
North Dakota Century Code 15-27.3-10	4
North Dakota Century Code 15-34.2-01	12, 13, 23
North Dakota Century Code 15-34.2-06.1	2, 4, 9, 10, 12, 25
North Dakota Century Code 15-43-11.2	9, 11, 22, 29

STATEMENT OF THE CASE

This controversy commenced in August, 1985, when Paula Kadrmas, the mother of an elementary student, Sarita Kadrmas, refused to sign a written bus transportation agreement with the Dickinson School District. Similar agreements were requested of and received from parents of all children riding the buses. The purposes of the contracts were to identify precisely the pupils who would be riding the buses and to compute the total revenue that could be anticipated from the bus subscribers. With that information, which was required prior to the start of the school term, the bus supervisor could plan the various bus routes and be reasonably assured that each bus would be efficiently utilized.

The fees charged each family depended upon the number of children riding the bus. Each family with the same number of children was charged the same fee regardless of the distance travelled. Sarita Kadrmas, who lives 16 miles from her school, travelled farther than most other bus riders, but was charged the same fee, which was \$97.00 for the full year.

At the beginning of this litigation the issue was whether free schools under the North Dakota Constitution included free transportation; it was not any claimed inability by the Kadrmas family to pay the nominal bus fee.

The Kadrmas family income was above the poverty threshold. As indicated by Appellants' testimony, the family had an annual income in 1985 of \$15,003.43, whereas the poverty guidelines for that year, published by the Department of Human Services, indicate a level of \$12,450.00

for a family of five. Although the Kadrmas family is one of limited means, the stipulated bus fee, which amounts to \$10.77 per month during the school year, was well within their means. Other factors that proved to be much more of a burden than the nominal bus fee were the fact that Sarita's father paid no child support (J.A. 31), and that Paula Kadrmas had several adult relatives living with her and depending upon support from her husband, Ross (J.A. 31).

Testimony in the trial court on the subject of poverty guidelines was presented by Gary Spryneznyatyk who stated that the poverty level for a family of five was \$1,038.00 per month. That computes to \$12,456.00 per year and conforms with the guideline mentioned above. It seems clear that the Kadrmas family, although fairly near the poverty level, was above that threshold. Ross Kadrmas was the sole source of support of his wife, Paula, and his step-daughter, Sarita.

School districts such as Dickinson which have not re-organized under North Dakota law are few in number, comprising only eight of the total of 310 school districts in the state. However, those eight tend to be those of larger enrollments and their total enrollment comprises approximately 38 percent of the public school enrollment in the entire state. Those eight districts are the only ones permitted to charge a fee under the provisions of 15-34.2-06.1, N.D. Cent. Code. However, it must be recognized that of the 44,540 students attending school in those eight dis-

tricts, only 3,834 (8.6 percent) are bus riders and therefore subject to paying fees under the disputed statute. The vast majority (40,706 students) are not privileged to ride a bus and therefore are required to pay all expenses involved with their transportation to and from school.

The specific rules vary from district to district but in general, the only students transported on buses in these districts, and consequently the only students who are subject to the nominal bus fee, are those that live in rural areas several miles from school. In the case of the Dickinson District, the minimum distance from school in order to qualify for bus service is 3 miles from an elementary school and 4 miles from high school. North Dakota law permits each non-reorganized district to set its own mileage minimums.

It would be logistically impractical and economically burdensome for any school district like Dickinson to bus all students to school. As discussed in the decision below by the North Dakota Supreme Court (J.A. 57), the obligation of transporting students to and from school in North Dakota has been shared by the parents together with the state and school district since the early days of statehood. That sharing is exemplified in the busing plan at Dickinson by allowing students that live in remote portions of the district, such as Sarita Kadrmas, door-to-door transportation from home to school and return with 89 percent of the cost being paid by the taxpayers (78 percent by the state and 11 percent by the local school district), and the remaining 11 percent being paid by the bus users. Cost of transportation to the Kadrmas family and other bus users is relatively much smaller than the cost incurred

by the great percentage of parents in the district, those who reside within the 3 or 4 mile limit and do not have the bus service available for their children, but reside beyond normal walking distance from school.

The great majority of school districts within North Dakota are reorganized school districts, having been formed by the combination of several districts. The North Dakota law permitting the reorganization of districts does require that the initial reorganization plan provide for the transportation of students, either in the form of bus transportation or mileage payments to families. Each separate reorganized district formulates its own transportation plan, and when the reorganization is approved by the voters of that district, it becomes binding.

It is true that bus fees in reorganized districts are not authorized by the statute. The reason for that is that when the statute permitting bus fees in districts like Dickinson (15-34.2-06.1) was passed, virtually all of the reorganization of school districts within North Dakota had been completed and all of those districts had in place a transportation plan which had been approved by the voters and could not then be changed by legislative enactment.

Appellants apparently have the misconception that the transportation plans in all reorganized districts are the same. That is not true. All the statute (15-27.3-10, N.D. Cent. Code) requires is that there be a proposal for the transportation of students. Each district is at liberty to formulate its own rules and that is precisely what has been done.

Although no fees are charged in reorganized districts, it is not true that all students are given bus transporta-

tion. Of the total number of students in reorganized districts (73,554), approximately 59 percent are given bus transportation and 41 percent are required to get to and from school entirely on their own and at their own expense. A very common minimum, within which bus service is denied all students, is 2 miles from the nearest school, and that generally excludes all residents of towns as well as those in adjacent rural areas. Another important aspect in which transportation plans within reorganized districts are different is the designation of pickup points. In many districts, students are picked up and returned to the door of their residence but in others they are required to travel some distance, often several miles, to meet the bus at some designated pickup point. Therefore, although families in reorganized districts do not pay bus fees *per se*, many of them are required to pay part, if not all, of the cost of their transportation to and from school.

The cost-sharing arrangement between families and government discussed by the North Dakota Supreme Court in this case is applied in all districts, both reorganized and non-reorganized. We submit that the share of actual cost required of this Appellant is a minimal contribution which cannot be considered onerous and certainly is no barrier to Sarita participating in the benefits afforded by the Dickinson Schools. The actual cost per mile in the case of Sarita Kadrmas, in exchange for efficient door-to-door service, is just 1.7¢, which by any measure is a nominal fee and a value that can't reasonably be rejected by the Kadrmas family.

The evidence shows that during the school year of 1985-86 the Kadrmas family actually expended \$114.00 per

month for gasoline alone in connection with transporting Sarita to and from school (J.A. 32). That amounts to \$1,026.00 over the nine-month school year and compared with the stipulated \$97.00 annual bus fee, is a ratio of 10.5 to 1. On a daily basis, the bus fee amounts to 55¢, and in return for that, Sarita is hauled a total of 32 miles from her home to school and returned.

The amount of the bus fee charged in this case is in compliance with the statute, which limits the district to its actual cost not reimbursed from state revenues. The philosophy of the legislation is to leave control of the details with the local district and to permit it, in its discretion, to charge the users a nominal fee to at least in some small measure equalize the burden of transportation born by the majority (the 91.4 percent of students not using the bus in districts not reorganized) that must pay the full cost of their transportation to and from school.

The trial court specifically found that Kadrmas did not at any time request a waiver of the fee (J.A. 46), and that all the Dickinson School District required was that an agreement to pay fees be signed and that Kadrmas make a bona fide effort to pay what and when she could (J.A. 47). No one has ever been refused bus service in the Dickinson District because of failure to pay fees and no court action has ever been taken in an attempt to collect any delinquent fees (J.A. 34). Sarita Kadrmas had used the bus service during the previous school year (1984-85) without the payment of any fee (J.A. 30). With such a liberal policy, there was no practical need for anyone to request a waiver.

Paula Kadrmas did not testify that she was unable to pay the bus fee. If she had made such an assertion, it

would be incredible because the Kadrmas family obviously had resources to pay that nominal amount. They in fact expended ten and a half times that amount for gasoline alone in connection with Sarita's transportation to and from school.

It must be remembered that with the Kadrmas family choosing to live in such a remote residential setting, 16 miles from school and almost that far from the nearest gas station and grocery store, it obviously needed and did in fact have vehicles for transportation to and from Dickinson on a regular basis. Except for the school bus, there is no form of public transportation available in that area. Throughout the 1985-86 school year and until her mother decided to accept the benefits of school bus transportation for Sarita in April, 1987, Sarita was regularly transported to and from school by her family and as a result missed no educational benefits (J.A. 30).

On April 6, 1987, Paula Kadrmas concluded that it made no sense to continue to refuse the benefits of bus transportation for Sarita and on that date she signed a contract for the remainder of the school year and paid \$10.00 toward the bus fee. Subsequently, in August 1987, she signed another contract for the 1987-88 school year and paid \$50.00 toward the annual bus fee which is still at \$97.00 per year. Therefore, Paula Kadrmas has essentially paid to date for Sarita's transportation since she commenced riding the bus again, but, consistent with the ongoing policies, whether or not further fees are paid, Sarita will continue to ride the bus as long as she wishes since the required agreement has been signed.

Because of these recent developments, we believe that the Appellants do not have standing to maintain any con-

stitutional issue on this appeal. That matter was separately addressed in a Motion to Dismiss Appeal, dated December 18, 1987. We believe that this case should be disposed of on the basis set forth in that motion without reaching the issues treated in this brief. Clearly and logically, Paula and Sarita Kadrmas have elected to take the benefits of the bus service available for the payment of the nominal fee and, accordingly, they do not have standing to contest the constitutionality of either the statute or of the policies of the Dickinson District under which those bus services are available.

The bus fee in the Dickinson District originated in 1973 following a plebiscite of the bus users who preferred to pay the nominal fee in exchange for the increased benefit of door-to-door service. It has continued in effect since that time with no objections from bus patrons, except for the Appellants in this case. Generally, the families entitled to utilize this service appreciate the benefit of their children being picked up and returned to their door and are happy to pay for it. The alternative, which was the effective policy prior to 1973, is to require the parents to transport their children from their home to a bus pickup point which could be anywhere from a fraction of a mile to several miles. Even when the distance from home to the bus stop is relatively short, it generally means starting a vehicle and driving the child to the bus in the morning and repeating the process in the evening in connection with the return trip. Although in some instances the trip from home to the bus stop is a short walk, the severe North Dakota winters usually require that the families furnish vehicular transportation to and from the bus stop.

We note that the Appellants in their brief suggest that the Dickinson School District could avoid charging the fee by reverting to the previous policy of requiring patrons to meet the bus at designated pickup points (p. 28). That suggestion of her counsel has not been expressed in the testimony of Paula Kadrmas, and it seems clear that the great majority of the bus patrons prefer the door-to-door service in exchange for the payment of the fee. Whether or not the Dickinson District should continue with the door-to-door service with the fee or revert to the previous policy of having children come to convenient pickup points (and not pay a fee) should remain a matter of local control, with the decision made by the school board in consultation with its patrons.

There are approximately 3,300 public school students in the Dickinson District, and 434 of them (13 percent) are able to utilize the bus service. Sarita Kadrmas is only one of those 434.

Contemporaneously with the passage of 15-34.2-06.1, N.D. Cent. Code, in 1979, the North Dakota legislature passed 15-43-11.2, N.D. Cent. Code, which authorizes numerous other fees that may be charged by school boards.¹

¹Section 15-43-11.2, N.D. Cent. Code, states:

"A school board is authorized to require payment of the following fees:

1. A security deposit for the return of textbooks, materials, supplies, equipment, and may require pupils to furnish personal or consumable items. A use charge may be made when the "textbook" returned has had an undue amount of wear.

(Continued on following page)

That statute refers to "other fees and charges permitted by statute", and therefore, it clearly pertains to 15-34.2-06.1, N.D. Cent. Code, in its general provisions which include the following:

"A board may waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. *No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees.*" (Emphasis added)

The first quoted sentence clearly permits, but does not mandate, the issuance of a waiver by the school board.

(Continued from previous page)

2. Admission fees or charges for extracurricular or non-curricular activities where attendance is optional.
3. Fees or premiums for any authorized student health and accident benefit plan.
4. Fees for personal physical education and athletic equipment and apparel. Any pupil may provide his own equipment or apparel if it meets reasonable health and safety standards established by the board.
5. Fees in any program where the resultant product becomes the personal property of the pupil.
6. Fees for behind-the-wheel drivers education instruction.
7. Other fees and charges permitted by statute.

Sections 15-43-11.1 through 15-43-11.4 shall not preclude the operation of a school store where pupils may purchase school supplies and materials. A board may waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees. This shall not preclude the school district's right to withhold diplomas for a student's failure to pay for those costs incurred by his own negligence or choice, such as fines for damaged texts and school equipment, library fines, and materials purchased from the school at the option of the student."

The second sentence, however, is a mandate and requires that no rights or privileges be denied for nonpayment of fees. That mandate has been complied with by the Dickinson School District as testified to by the Defendant, Richard Rykowski (the bus supervisor), at page 151 of the trial transcript:

Q. Have you or the district ever other than the situation that we have here, the three children involved in this case, for 1985-86, have any children been refused bus service by the Dickinson School District in your experience?

A. No one has been refused bus service.

Q. In addition to the Plaintiffs are there others that haven't paid the fees for previous years in full?

A. Yes.

Counsel for the Appellants conceded at trial that 15-43-11.2, with its provision for a waiver, applies to the bus fees as indicated in this statement by Mr. Houdek in the trial transcript at page 16:

"I must concede that I believe it would remove the statute from argument that it denies equal protection because it doesn't provide for a waiver. Clearly, that waiver provision applies to any fee that a school can impose and therefore would apply to the payment of transportation fees or busing fees in question."

Paula Kadrmas never requested a waiver of the fee. On the contrary, and contrary to the repeated protestations by her attorneys that she can't pay the nominal fee involved, Paula Kadrmas testified that she was willing to pay the fee and that she objected only to the signing of the contract which she apparently felt would cause her to lose standing to maintain this action. Prior to the 1985-86 school year, when battle lines were being drawn in this

case, she contacted Richard Rykowsky and as she testifies at page 46 of the trial transcript:

A. I called up the busing superintendent. I called Mr. Rykowsky and asked if a person could make payments without signing the contract and the answer was no.

Dickinson does bus students to and from athletic and other extra-curricular events. However, all of that busing involves transportation from the school to the event and return to the school. In all instances of extra-curricular busing, the participating students are entirely responsible to transport themselves from their home to the Dickinson school, where buses are available, and to then return home from school entirely at their own expense. In that respect, all students are treated alike whether they live one mile or 16 miles from school and whether or not they might otherwise participate in the regular bus service to and from school with the payment of the concomitant fee.

Under North Dakota law, the Dickinson School District is not and never has been required to offer any kind of bus service. The fee authorized by 15-34.2-06.1 is optional as is the institution of bus service of any kind.²

²Section 15-34.2-01, N.D. Cent. Code, provides as follows:

"The school board of any school district in the state, in its discretion, may furnish to each family living in the district:

1. Vehicular transportation; or
2. The equivalent of the payments specified in section 15-34.2-03 in lodging at some other public school if the same is acceptable to the family.

The board shall not accord the benefits of either subsection 1 or subsection 2 to any family which is receiving payments

(Continued on following page)

The following quotes are taken from the North Dakota Supreme Court decision in this case below, *Kadrmas v. Dickinson Public Schools*, 402 N.W.2d 897 (1987), J.A. 53:

"The Plaintiffs do not and cannot assert in this case that the fee actually denied their children an opportunity to attend school." *Ibid.*, J.A. 63. "A statutory scheme under which a school district offers to provide student transportation at considerably less expense to the parent than self transportation would entail does not constitute a deprivation which offends either federal or state equal protection rights." *Ibid.*, J.A. 63.

The primary issue presented in this case at the trial court level, and re-asserted on the appeal to the North Dakota Supreme Court, was whether or not free public schools, as mandated by Section 2 of Article VIII of the North Dakota State Constitution includes free transportation to and from school. On that issue, the North Dakota Supreme Court was unanimous in finding that free transportation was not an integral part of free public schools. The equal protection arguments which remain and which are emphasized on this appeal were addressed initially as

(Continued from previous page)

under section 15-34.2-03. In the event any school board elects to furnish vehicular transportation by public conveyance, the distance that each student must reside from his school in order to be entitled to such transportation may be determined by the school board in each district, but all students in the district shall be treated on the same basis in accordance with such determination. The furnishing of benefits under this chapter may be extended to families living in the district for the purpose of transporting students to another school district or county agricultural and training school within the state, or another school district outside the state, if the attendance of such students in the other districts is in accordance with the provisions of this title governing the same." (Emphasis added)

secondary arguments, and consequently, much of the record from the trial court is not pointed toward the issues now addressed.

It is clear from the record that the failure to pay the bus fee on behalf of Sarita Kadrmas would not have prevented her receiving the full benefits of the door-to-door service. Those fees never have been paid for Sarita for the 1984-85 school year (J.A. 30), but she had bus service then and has it again now notwithstanding that delinquency.

Although North Dakota does have a compulsory school attendance law, as we believe is typical in most if not all other jurisdictions in the United States, the threat of any prosecution is not a part of this case. Sarita has, in fact, attended school on a regular basis, even while her mother was eschewing the available bus service, and there has never been any hint to Paula Kadrmas that she is or might be in violation of the compulsory attendance law.

Although it is true, as indicated in Appellants' brief, that the Kadrmas family did incur excessive and unnecessary expenses in connection with transporting Sarita between September 1985 and April 1987, that was entirely based upon their own decision.

As noted in Appellants' brief (p. 7), North Dakota law does require all reorganized school districts to provide some kind of transportation system or, alternatively, to pay some parents of the children a mileage fee to transport their children to and from school. When family-type transportation payments are made, the district has discretion as to the amounts to be paid, provided that they are evenly applied to all patrons, but the minimum amount

is only 10¢ per mile which clearly would be inadequate in this day and age to compensate anyone for the use of any kind of vehicle. Therefore, although a system may be in place, the payment of mileage at 10¢ per mile obviously requires the family not only to supplement but to pay the majority of transportation expenses to and from school. Such a result is consistent with the policy of shared expenses between the school district and the parents as discussed in the North Dakota Supreme Court decision below (J.A. 57).

Although the Appellants characterize the bus fee charged by Dickinson as inflexible, it is clear from the record that it has been administered fairly and that no student has ever been denied transportation based upon an inability to pay.

As discussed in the North Dakota Supreme Court decision below, there is a rational basis for requiring some type of transportation system in reorganized districts and not mandating any such system in districts such as Dickinson that have not reorganized, while at the same time permitting the charging of a nominal fee for those utilizing the bus service. The North Dakota Court said that such different treatment was rationally related to a legitimate government purpose, that being to encourage school district reorganization and with it enhanced and more effective school systems in the reorganized districts (J.A. 64). The North Dakota Court concluded that by assuring some type of transportation in reorganized districts the people voting on the reorganization would be more likely to approve it since their concerns involving student transportation would be alleviated.

Contrary to the conclusions reached by the Appellants in their brief, the authorization of the bus fee to be charged by districts such as Dickinson has nothing to do with the reorganization of school districts. The reasoning for it is to simply have the few that use the service pay a small portion of that cost in exchange for the substantial benefits received.

The only reason that the fee authorization was not extended to reorganized districts is that those districts, prior to the passage of the statute permitting fees, were already committed on an individual district basis to some type of transportation system which had been submitted to and approved by the voters in each separate district. To permit the 1979 statute authorizing fees to be retroactively effective in reorganized districts would have been an obvious impairment of existing legal relationships since the already established transportation systems in the various reorganized districts did not include any authority to charge a fee.

There is nothing in the legislation herein discussed or in the opinion from the North Dakota Supreme Court in this case that suggests that the charging of a small fee, such as Dickinson does, would have any effect to encourage further reorganization. As a matter of fact, Dickinson almost certainly will never be part of a reorganized district. The reorganization of school districts in the State of North Dakota is essentially completed.

SUMMARY OF ARGUMENT

The contested statute is reasonable and is not subject to constitutional attack. It permits the charging of a modest fee which is set by the local school district but is limited to the monetary deficit remaining after applying state transportation subsidies. In the Dickinson School District bus users, comprising only 13 percent of the total enrollment, are charged fees totaling 11 percent of the actual transportation cost. The remaining 87 percent of the students do not have bus service available to them and must pay 100 percent of their individual expenses involved in getting to and from school.

The contested legislation passes the rational basis test since it is calculated to have those who gain the benefits of the bus service pay a small portion of the costs incurred, thus carrying out the long recognized principle in North Dakota that the cost of transportation to and from school is a shared responsibility between the school district and the parents.

By bringing this appeal, the Appellants are attempting to revisit the primary issue raised in this case at the trial court level. The argument there was that free transportation should be made available to all as part of free public schools mandated by the Constitution of the State of North Dakota. That issue was decided adversely to the Appellants in the North Dakota Supreme Court and is not subject to review here.

Allegations are made repeatedly in their brief that the Appellants were desperately poor, whereas the facts establish that their family income was above the poverty level.

The Appellants argue that charging the nominal disputed fee essentially denies Sarita Kadrmas access to school by attempted analogies to key decisions of this Court such as *Little v. Streater*, 452 U.S. 1 (1981); *Griffin v. Illinois*, 351 U.S. 12 (1956); and *Boddie v. Connecticut*, 401 U.S. 371 (1971). However, the facts in this case show that Sarita Kadrmas has continued in regular school attendance. The facts also show beyond dispute that the reason the small fee was not paid was to maintain legal standing and that, in fact, the parents of Sarita Kadrmas were able to and did pay expenses for her transportation greatly exceeding the bus fee.

Equal protection of the laws does not deny a state the right to make classifications in the law when such classifications are rooted in reason. Charging a small fee to the select few that are able to use the bus service, recognizing that the vast majority must foot all of their transportation expenses, is fair and reasonable.

The philosophy behind the statute authorizing bus fees is that the matter should be controlled by the local school board who is best able to determine what portions of the enrollment should be bused, the conditions under which the busing should be carried out, and the amount of fees to be charged for such services, within the limit of the basic statutory authority.

Notwithstanding the repeated protestations by the Appellant, claiming that transportation is an integral part of free public schools, that issue is not before this Court. The only issue is whether or not these Appellants have been denied equal protection of the laws. The record shows that they have been accorded equal protection which

has included a forgiveness of the prompt payment of the stipulated fee.

A separate equal protection constitutional attack by the Appellants is premised upon the distinction in the North Dakota law between reorganized districts, which are not directly authorized to charge any bus fee to patrons, and districts which have not reorganized (and generally have no need to reorganize) such as Dickinson, which are permitted to charge a fee to those riding the school buses. The reason that the fee statute does not apply to reorganized school districts is that each of those districts, in its reorganization election, has already voted upon and established a transportation plan of some type upon which the residents and taxpayers are entitled to rely. No such election and prior commitment has occurred in the Dickinson School District or other districts similarly situated.

The justification for the different treatment of reorganized school districts from districts like Dickinson, as discussed in the decision of the North Dakota Supreme Court, is that in order to encourage reorganization of school districts and therefore enhance the quality of education in those areas, it was advisable and effective to install a transportation program as an integral part of the benefits offered in that particular district, thereby gaining support of patrons who justifiably were concerned about how their children would get to school in the reorganized district. Typically greater travel distances are involved to different schools in the new and larger reorganized district.

Even in reorganized districts, 41 percent of the students are not furnished bus transportation.

Considering the total public school enrollment in North Dakota, including both reorganized and non-reorganized districts, 47,249 students of the total of 118,094³ ride buses. Therefore, only approximately 40 percent of all North Dakota students ride buses, including both those that pay fees and those that do not. The other 60 percent have the full burden of their transportation to and from school without the assistance of any public funds or facilities. Generally, the students that are bused in North Dakota are those that live in remote points and do not have convenient alternative transportation modes available to them such as car pooling and the city bus line.

The North Dakota legislature has seen fit to leave all decisions concerning transportation details with the local school boards who are best able to meet the individual needs of their patrons within the limit of resources available.

The contested statute passes the rational basis test. It is only reasonable that the minority who have the benefit of the bus transportation system pay a small fee in return for that privilege, especially so when both the statute and the policies of the Dickinson School District guarantee that no one is denied bus service because of an inability to pay the fee.

³These figures were obtained from the North Dakota Department of Public Instruction and pertain to the 1986-87 school year.

ARGUMENT

I. SINCE THE STATUTE PERMITTING CHARGING A BUS FEE APPLIES TO NON-REORGANIZED DISTRICTS ONLY, DOES IT VIOLATE THE EQUAL PROTECTION CLAUSE?

The statute permitting the charging of bus fees pertains only to districts that have not reorganized under the laws of the State of North Dakota. As above discussed the non-reorganized districts are few in number, only 8 of 310 districts, but they are the larger districts and collectively have 37.7 percent of the public school enrollment in the state. The reason that the legislature did not include reorganized districts under the 1979 statute is that each of the reorganized districts had already formulated its individual transportation plan and the fee-charging legislation would likely have the effect of retroactively altering those individual transportation plans. On the other hand, the non-reorganized districts were not and never have been obligated to any transportation plan and permitting them the clear authority to charge a nominal fee did not disturb any contractual rights or obligations.

We note that the Attorney General for the State of North Dakota is filing an *amicus curiae* brief in support of the Appellees. We adopt all of the arguments and authorities contained in that brief and especially the thorough historical account of the North Dakota statutes involved and the explanation of school district reorganization within the State of North Dakota.

As explained in the *amicus* brief of the Attorney General, the statutes governing non-reorganized districts, like

Dickinson, have never required any transportation system, whether it be furnishing buses or payments for family transportation. That always has been and still is a discretionary matter with those districts that are not committed pursuant to an individual reorganization plan.

Historically, Dickinson has maintained a bus system for the small percentage of its students that reside in rural areas, although generally the vast majority of students have been and still are required to transport themselves to and from school, relying upon their own resources. Sarita Kadrmas belongs to the 13 percent minority that lives far enough from school to qualify for available bus service.

Dickinson charged the fee without the benefit of any specific statute until 1979 when the questioned statute was passed. Its enactment was thought necessary primarily because of the contemporaneous enactment of 15-43-11.2, N.D. Cent. Code, which indicated, at least by implication, that any fee charged that was not specifically authorized by statute would be illegal, especially considering the requirement of free public schools in the North Dakota Constitution.⁴

There are indeed rational bases for the statutes permitting these bus fees.

⁴Article VIII, Section 2, of the North Dakota Constitution provides:

"The legislative assembly shall provide for a *uniform system of free public schools throughout the state*, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education." (Emphasis added)

First of all, the intent is to have those privileged to ride the bus pay for that service, albeit a very small portion of the actual cost. By doing so it more fairly differentiates between the minority riding the bus (13 percent in Dickinson) and the majority who have to furnish their own transportation (the other 87 percent) who are not only denied the privilege of riding the bus but constitute a large portion of the local tax paying public which contributes a portion of the revenue supporting the bus service.

Secondly, the statute permitting the charging of the fee as well as the one making transportation services optional for non-reorganized districts (15-34.2-01) recognizes that it is not economically feasible to transport all or even a majority of the students by bus and that the decisions involving which students in each district should be bused and for what fee are best left to the local school district.

Thirdly, by having the bus users contribute to the transportation cost, school district dollars can be used for education benefits utilized by all of the students in the district.

Bus transportation is not an integral part of an education, especially when only a small minority of all students participate in the bus system.

The North Dakota Supreme Court in its decision in this case below (J.A. 62) applied the rational basis test to the statute with the following quotation:

"In our view the challenged statute in this case is purely economic legislation which neither involves a suspect classification nor a fundamental or important

substantive right which would require the strict scrutiny or intermediate standard of review. In similar equal protection challenges to legislation involving student transportation the traditional rational basis standard of review has been employed."

This Court has held that public education is not a right granted to individuals by the Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982).

The North Dakota Supreme Court, in explaining the reason for the different treatment between reorganized and non-reorganized districts stated as follows (J.A. 64):

"We believe the foregoing statutes, to the extent that they treat reorganized and non-reorganized school districts differently regarding student transportation, constitute legislation which is rationally related to a legitimate government purpose. The obvious purpose of such legislation is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system. The legislation provides incentive for the people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district."

Equal protection does not mandate equal provisions for everyone under the law, especially here where the difference in treatment between reorganized and non-reorganized districts has clearly served a legitimate government purpose. The reorganization of school districts in North Dakota has been an important movement since its inception in 1947 and respecting and maintaining the various transportation plans in the reorganized districts

was certainly reasonable and appropriate in 1979 when 15-34.2-06.1 was passed.

In *Plyler* this Court stated at 102 S.Ct. 2404:

"Thus *Rodriguez* held, and the Court now reaffirms, that 'a state need not justify by compelling necessity every variation in the manner in which education is provided to its population.'"

II. DID THE APPLICATION OF THE BUSING FEE BY THE DICKINSON DISTRICT DEPRIVE SARITA KADRMAS OF EQUAL PROTECTION OF THE LAWS?

Throughout this litigation the Appellants have endeavored to equate availability of bus transportation to access to education. They suggest in their brief that the nominal bus fee involved here is very much like the tuition fee in *Plyler, supra*. In *Plyler* the Texas statute permitted direct exclusion of all alien students from the Texas schools. Sarita Kadrmas has not been denied access and, in fact, has realized full access to her school in Dickinson throughout the period involved.

The evidence in this case indicates that the Kadrmas family was above the poverty level and that, in fact, Paula Kadrmas indicated a willingness to pay the fee in exchange for the services as long as she could maintain her standing to contend that the North Dakota Constitution, mandating free schools, also mandates free transportation for all.

From the beginning of this case, the issue has not been the ability of the Kadrmas family to pay the fee, but whether they should pay the fee in light of their planned constitutional attack to correct the failure to reach the same constitutional question in *Bismarck Public Schools*

v. Walker, 370 N.W.2d 565 (ND 1985). As stated at page 5 of Appellants' brief:

"Paula called the transportation officer, Richard Rykowsky, and asked whether her daughter Sarita could ride the bus if the family paid partial payments, but did not sign the contract. She was told the contract must be signed. After discussion, the Kadrmas family decided the fee should not have to be paid and refused to sign the contract." (Emphasis added)

As above indicated, there is no evidence in this case supporting the contention that the Kadrmas family could not pay the fee or that they ever requested any relief from the school district on grounds that the fee was an economic imposition.

Appellants contend that the Kadrmas family, because of their limited economic resources, should not be subject to the payment of the bus fee. Any economic disadvantage the Kadrmas family has in this case does not create a suspect class that would justify any scrutiny beyond the rational basis test.

Appellants point to *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Little v. Streater*, 452 U.S. 1 (1981); and *Smith v. Bennett*, 365 U.S. 708 (1961) as authority for the application of a higher level of scrutiny. Each of those cases is clearly distinguishable from the case at hand.

Boddie was decided on due process and not equal protection principles. However, the effect of the disputed statute in that case prohibited women who were receiving welfare assistance from obtaining divorces because of their inability to pay required court fees. No other course of

action was available to them and the statute effectively prevented their access to the divorce court.

In *Griffin*, Illinois law prevented convicted criminal defendants from obtaining transcripts of their trial if they did not have the money to pay for it. Clearly the effect of that law was to deny the indigent defendants the opportunity of reasonably prosecuting their appeals through the court system. Again, there was no alternative to getting a transcript of the trial proceedings.

In *Little*, the appellant was the putative father of an illegitimate child and his indigency prevented his obtaining exculpatory evidence by way of a blood test. This Court held that the Connecticut statute which required the party requesting the test to pay for it denied him due process because of his indigency. Clearly, there was no reasonable or effective alternative to the blood test and due process was denied.

In *Smith* the statute mandating a fee effectively denied the indigent petitioner the right of habeas corpus and that was determined to be a denial of equal protection. No alternative was available.

None of the above cases is applicable here. As stated in *Rodriguez*, 93 S.Ct. 1278, 1290, in order for a person to show discrimination in line with cases like *Boddie*, *Griffin*, *Little* and *Smith*, two distinguishing characteristics must be established. One is that because of their impecuniness they were completely unable to pay for some desired benefit and, secondly, that as a consequence they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

Although it is most convenient for Sarita Kadrmas to ride the bus to school and return, clearly other means of transportation are available and, in fact, those other means were utilized for almost two full school years, albeit at greater expense to her parents. Sarita Kadrmas was not deprived of transportation nor of any other benefit related thereto.

There are many ways to get to and from school, depending upon various factors such as distance to be travelled, age and physical condition of the student, and the weather conditions. It is likely that families not privileged to ride the bus will use different modes of transportation from time to time depending upon the situation. Certainly, the state has no monopoly in this area and does not dictate to anyone the mode of transportation to be followed. Even in the case of families living within the area served by the bus routes, some of them elect from time to time to utilize other forms of transportation to suit their convenience and to have more individual choice as to such things as the route to travel and the times of arrival at and departure from school.

Cases that are analogous to the instant case, dealing in the areas of economic and social welfare, include *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631 (1973), and *Ortwein v. Schwab*, 410 U.S. 656, 93 S.Ct. 1172 (1973). Both involved indigent appellants who sought relief from the requirement of normal court fees.

In *Kras* the appellant sought forgiveness of the bankruptcy fee in order to proceed with his personal bankruptcy. This Court held that *Boddie*, *supra*, was not applicable and pointed out that in *Boddie* the judicial pro-

ceeding (the divorce) was the only effective means of resolving the dispute at hand, whereas a bankrupt has other means of addressing his financial problems and that his position would not be materially altered in any constitutional sense if he was not discharged in bankruptcy.

In *Ortwein*, the issue was the fee for an appeal seeking an upward adjustment of welfare payments. This Court stated at 93 S.Ct. 1172, at 1174:

"In this case, appellants seek increased welfare payments. This interest, like that of *Kras*, has far less constitutional significance than the interest of the *Boddie* appellants."

The claim that the bus fee statute is constitutionally infirm is answered by a simple reading of the companion statute also passed in 1979, dealing with school fees in general. Section 15-43-11.2, N.D. Cent. Code, specifically provides in part:

"No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees."

Even if the stringent ruling of cases like *Boddie* is applied, the quoted portion of the statute meets any constitutional objection based upon an inability to pay.

If we presume, for purposes of argument, that the Kadrmas family was indigent and could not afford to pay the fee, clearly the North Dakota statutes, as well as the execution of those statutes by the Dickinson School District provided that no one would be denied the opportunity to ride the bus solely because of an inability to pay the fee.

The applicable standard of review is the rational basis test as indicated in *Papasan v. Allain*, 106 S.Ct. 2932 (1986), and in *Rodriguez, supra*. This Court stated in *Papasan* at 2945:

“... we are persuaded that the Court of Appeals properly determined that *Rodriguez* dictates the applicable standard of review. The differential treatment alleged here constitutes an equal protection violation only if it is not rationally related to a legitimate state interest.”

Quoting from *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, at page 1291:

“A sufficient answer to appellee’s argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”

The argument has been made that the fee should be adjusted in accordance with the actual distance each student is transported. Actually the Kadrmas family benefits from the fee arrangement since Sarita is farther from her school than the average student riding the bus, although the fee charged to her is the same as for the others. The amount of the fee, by anyone’s measure, is an extremely reasonable charge. It puts Sarita in a preferred position to the majority of the Dickinson students who do not have the bus service available to them.

Even if it were feasible to scale busing fees in accordance with each family’s ability to pay, such is not constitutionally mandated. As this Court stated in *Rodriguez*, 93 S.Ct. 1278 at 1290:

“The Court has not held that fines must be structured to reflect each person’s ability to pay in order to avoid disproportionate burdens.”

In response to a direct question as to why she did not pay the fee, Paula Kadrmas eschewed any attempt to claim inability to pay the fee as indicated in this passage from the trial transcript at page 49:

Q. So why don’t you just pay the contract fee?

A. Because I don’t believe that a person should have to pay to have their children bused to school just because they live twelve miles outside of the school.

The above exchange was in response to a question from Paula’s attorney, Mr. Houdek. Obviously, at that time the principal issue being presented to the trial court was that of free bus service for all under the North Dakota Constitution, not the equal protection argument.

Although Appellants suggest that the fee constitutes a barrier to education, that contention is not supported by the evidence or by any realistic appraisal of the amounts involved. In *Papasan, supra*, the concurring opinion of Powell, J., states at 2952:

“The Equal Protection Clause, at least in the context of a state funding of schools, is concerned with *substance*, not with the *de minimis* variations of funding among the districts.”

“I cannot believe that \$74.71—the alleged difference between the average per pupil payment from Sixteenth Section lands and the average per pupil payment from the State’s trust fund in place of the Chickasaw school lands—creates a ‘detriment’ to the students and schools within the Chickasaw Cession and

thereby gives rise to a violation of equal protection under the rational relation standard." *Ibid.*

By analogy, the 55¢ per day charged for door-to-door bus service for Sarita Kadrmas, amounting to 1.7¢ per mile, is in no reasonable sense a detriment but, on the contrary, is a special benefit most other students do not enjoy.

MOTION TO DISMISS—MOOTNESS

We reaffirm and restate our motion to dismiss previously submitted to the Court, dated December 18, 1987. As indicated in that motion, Paula Kadrmas, after the rendition of the final opinion by the North Dakota Supreme Court in this case, voluntarily signed two separate contracts and made two separate payments of fees for bus service for Sarita and Sarita has been participating in and receiving the benefits of that bus service continuously since April 6, 1987. Accordingly, it is our position, based upon the authority separately cited in our motion to dismiss, that any issues previously existing are now moot and that this case should be dismissed without any ruling on the merits. To do otherwise would be to issue an advisory opinion in a matter not now at issue.

The first contract signed by Paula Kadrmas is dated April 6, 1987, and immediately after that Sarita started receiving bus transportation. More than two months later, on June 19, 1987, is when the jurisdictional statement was completed by the Appellants' attorneys and when this appeal process commenced. The issues were then moot.

CONCLUSION

Based upon this brief, as well as the amicus brief submitted by the Attorney General of the State of North Dakota, we ask that this appeal be dismissed or, alternatively, that the judgment of the Supreme Court of the State of North Dakota be in all respects affirmed for the reason that all contested statutes, as well as the policies of the Dickinson Public School District, are in compliance with the equal protection clause.

Dated at Dickinson, North Dakota, this 18th day of January, 1988.

Respectfully submitted,

GEORGE T. DYNES
FREED, DYNES, REICHERT & BURESH, P.C.
Attorneys for Appellees
34 East First Street, P.O. Drawer K
Dickinson, ND 58602-8305

REPLY BRIEF

No. 86-7113

JOSEPH E. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor by her
next friend, Paula Kadrmas, *Appellants*.

v.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his
capacity as Superintendent of the Dickinson Public
Schools; CLARENCE STORSETH, NANCY JOHNSON,
MERRY JOHNSTON, HAROLD KRIEG, HERB HERAUF, in
their capacity as members of the Dickinson School
Board; RICHARD RYKOWSKY, in his capacity as
Transportation Supervisor of the Dickinson Public
Schools, *Appellees*.

On Appeal From The Supreme Court Of North Dakota

REPLY BRIEF OF THE APPELLANTS

EDWARD B. REINHARDT, JR.

Counsel of Record

North Dakota Legal Services, Inc.

P.O. Box 217

New Town, North Dakota 58763

(701) 627-4719

DUANE HOUDEK

Legal Assistance of North Dakota

P.O. Box 1893

Bismarck, North Dakota 58502-1893

(701) 222-2110

Counsel for Appellants

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
ARGUMENT.....	1
I A. The Busing Fee Has Been Challenged, From The Beginning, For Its Lack Of Waiver For The Poor. No Waiver Has Been Granted Even Though One Was Requested By Marsha Hall Prior To Commencement Of This Action.	2
B. The Busing Contract Imposes A Binding, Enforceable Debt Upon The Patron Signing It.	3
C. The Kadrmas Family Has Demonstrated They Live On A Poverty Level Income, And Are Unable To Pay The Required Busing Fee. ...	4
II Response To Legal Argument	5
A. The Dickinson Busing Fee Is Not Simply A Flat "User Fee".	5
B. Permitting A Fee For Busing In Non- Reorganized School Districts Is Not Justified Because It Induces Reorganization, Nor Because It Represents An Accomodation Of Local Control.	6

Introduction

The appellees, and *amici* who have filed briefs on behalf of appellees, make their arguments based on a factual scenario that is not representative of the entire record and, at times, simply incorrect.

The purpose of this brief reply is not to renew or reshape any legal arguments already made, but to point out to the Court the facts of record called into play by certain of the appellees arguments and, in much smaller part, to respond to what may be considered new arguments raised in appellees brief: 1) That this fee for busing children to school is just another "user fee", likened to a sales tax by the United States in its *amicus* brief and 2) the admittedly unequal treatment of reorganized and non-reorganized school districts by the state finds justification in considerations of local control, or in its inducement of reorganization of school districts.

ARGUMENT

The overall sense of the brief submitted by the School District is that there is really no reason this case is before the Court. The District suggests the Kadrmas family is not really poor; that the fee contract the district forces people to sign is really an insignificant matter, one that will not be enforced; and they imply that, in any event, if people want the busing fee to be waived they need only ask for it.¹ The case would indeed take on a different cast if these matters were true. But examination of the record indicates they are not.

¹ The State of North Dakota, in its *amicus* brief, goes farther and states "It appears likely that appellants would have been given the service had they shown the District that they could not pay the fee." Br 11.

I A. The Busing Fee Has Been Challenged, From The Beginning, For Its Lack Of Waiver For The Poor. No Waiver Has Been Granted Even Though One Was Requested By Marsha Hall Prior To Commencement Of This Action.

The school district attempts to convince this Court that the issue of waiver was not raised below, intimating that the whole matter would be settled if that is all the plaintiffs were requesting.

However, it is clear that no waiver has ever been granted in the fifteen years the Dickinson busing fee has existed. Tr. 120 Nor has anyone's income ever been considered in the imposition of the busing fee. *Id.*

And, contrary to the appellees' assertions, this action challenged, from the very beginning, the lack of a waiver or graduated fee scale for the poor in the school's busing fee policy. Amended Complaint, Paragraphs 15, 38 at J.A. 8, 13-14.

In fact, prior to commencement of this action, specifically on July 24, 1985, Marsha Hall, one of the plaintiffs below, sent a letter to Richard Rykowsky, Transportation Supervisor for the Dickinson School District. In that letter, Ms. Hall stated her concerns about the legality of the busing fee, and also wrote:

"To require bus fees places an undue hardship upon persons of limited income such as myself. Because of this, I would like to request that my children be transported for no charge." Exhibit "B", affidavit of Richard Rykowsky, filed in resistance to the plaintiffs' motion for temporary injunction.

Mr. Rykowsky, in the same affidavit, at page 5, acknowledged receipt of Ms. Hall's letter "well in advance of the [1985] school year". Yet, the request was ignored. No waiver was granted, nor any further financial informa-

tion solicited. Continuing in the same affidavit, at page 6, Mr. Rykowsky states that plaintiffs [Hall and Kadrmas] would have to sign the busing agreement, obligating them to pay the standard fee before the children would be bused to school. A showing of a shortage of finances would result, at most, in the District not requiring an advance fee to be paid.²

The contract for the fee would, as always, be required. Its function is more than planning bus routes, as stated in Appellees' Brief at 1. It has always been required, as well, to preclude challenges to the fee system under the rationale of *Bismarck School District v. Walker*, 370 N.W.2d 565 (N.D. 1985). TR. 129, 130.

B. The Busing Contract Imposes A Binding, Enforceable Debt Upon The Patron Signing It.

The appellees now argue that this contractual obligation imposes no hardship on a patron, because the District has not, to date, gone to court to collect the fee. Appellees' Br. 6. This, of course, ignores the fact that the district could, at any time, choose to enforce the debt through suit and enforcement of judgment. At least one district has sued a patron to recover a busing fee. See *Bismarck School District v. Walker*, *supra*.

The appellees' argument also makes it seem as though nothing is done to collect these contractual fees. In fact, Marsha Hall, who was found to be well below the poverty level by the trial court, testified that the Dickinson dis-

² Even this limited concession to the poor does not exist as part of any set fee policy. It is, as are all arguments made since, an after-the-fact response to the complete lack of a waiver system, made in the course of this litigation.

strict "kept hounding me for the money." (Tr. 103), presumably after they had been told of her inability to pay.

C. The Kadrmas Family Has Demonstrated They Live On A Poverty Level Income, And Are Unable To Pay The Required Busing Fee.

Repeatedly, at pages 1, 2, 25, and 26 of their brief, the appellees have sought to portray the Kadrmas family as people who have chosen to challenge this busing fee, but who have enough money so that it is not really a burden to them.

The record supports the fact that the Kadrmas family represents the working poor. Their gross income was found by the trial court to be "at or near the poverty level". Finding XII, J.A. 46.

There is ample evidence to support the trial court's finding. First, while many at poverty level have public benefit income that is not taxed and, thus, gross and net incomes that are virtually the same, the Kadrmas family paid over \$2,500.00 of their gross income in state and federal taxes, reducing the amount available to them to below the poverty line of \$12,500.00 per year for a family of five. Tr. 74. And, at times, they fed and sheltered other family members in need on that income, as well. Up to nine people resided in the household at some times during the year. Tr. 41.

Furthermore, the Kadrmas' income was sporadic. The month of the trial, December, 1985, they had \$77.00 income. Tr. 57. They were able to continue driving Sarita to school only by increasing their debt for car maintenance and gas, which they were to pay later. Tr. 43.

Given their circumstances, it simply is not accurate to portray the Kadrmas family as anything other than a family living in poverty.

Furthermore, as reflected in Paula Kadrmas' affidavit filed in this Court in support of her Response to Motion to Dismiss, the family's income has fallen, so that now they must live approximately \$6,000.00 per year, or about one-half of the poverty level for a family of five.

II. Response to Legal Argument.

The Appellees raise two arguments to which we will briefly respond: A) Finding the busing fee unconstitutional would threaten "user fees" of all types, and B) The difference in treatment between reorganized and non-reorganized school districts is justified because of 1) considerations of local control and 2) the inducement it gives districts to reorganize.

Before responding, it should be noted that we are not discussing a claim that all children in North Dakota have a constitutional right to be bused to school. Prior to trial, it was acknowledged that it is properly the role of the legislature or school district to set mileage limits within which no busing would occur. Tr. 23. We deal here with children living 16 miles from school, who, under any circumstances, would be included in those who would be bused.

A. The Dickinson Busing Fee Is Not Simply A Flat "User Fee".

In its *amicus* brief, the United States contends that the Dickinson busing fee is akin to a flat service tax, or user fee, and should be upheld as such. It is argued that to do otherwise would be to threaten the continued use of all types of user fees, excise taxes or sales tax.

The discussion of general user fees is much broader in scope than the fee involved in this case. We are dealing here with a narrow instance where a fee affects access to a right this Court and the State of North Dakota have given

a certain prominence, education. We are examining that fee within the context of a system that compels attendance in schools and then charges an access fee of those who cannot afford it. The fee is for busing, which is an essential service in North Dakota, and that is conceded by all concerned. The busing fee should not be likened to some fee for a non-essential service or benefit provided by the state, and voluntarily undertaken.

B. Permitting A Fee For Busing In Non-Reorganized School Districts Is Not Justified Because It Induces Reorganization, Nor Because It Represents An Accommodation Of Local Control.

It is argued by *amicus* State of North Dakota (Br. 25), and cited by the North Dakota Supreme Court (J.A. 64), that allowing non-reorganized school districts to charge a busing fee, while requiring the vast majority of districts to provide free transportation or in lieu payments, is justified because it has the beneficial effect of encouraging reorganization and its concomitant economic advantages. Apart from arguments set forth in our main brief, it now may be said that appellees concede that the proposed justification put forth by the North Dakota Court is not valid. At page 16 of Appellees' Brief, it is stated:

"There is nothing in the legislation herein discussed or in the opinion from the North Dakota Supreme Court in this case that suggests that the charging of a small fee, such as Dickinson does, would have any effect to encourage further reorganization. As a matter of fact, Dickinson almost certainly will never be part of a reorganized district. The reorganization of school districts in the State of North Dakota is essentially completed."

The second argument advanced to justify the fee charged by the Dickinson school district is that the stat-

ute permitting the busing fee is an exercise designed to permit local control of the issue by school districts. The history of the statute simply does not bear out that proposal.

First, the vast majority of districts are required to provide busing free of charge (248 or 311). They are given no local option of charging a fee for transportation. These are the districts that reorganized pursuant to a law in effect since 1947, long before the 1979 law permitting non-reorganized districts to charge fees was in effect. It may hardly be said that the 1979 law was part of a package designed to give options to North Dakota's school districts.

Rather, the law should be viewed as an exception to North Dakota's history of providing free transportation, and an exception to the rule in effect in the vast majority of the State. It was passed at the instance of one school district whose patrons, at the time, wanted service beyond that available in the rest of the state. It was not part of a state-wide program that was withheld from most districts because of a fear of interfering with reorganization plans, as appellees now claim. Only a very, very few districts were ever intended to be affected by the law allowing the imposition of a busing fee.

It is unfortunate that in the process of giving the people of Dickinson door to door service for a fee, the poor were forgotten. Not that they weren't considered at the time. Then superintendent Benzie of the Dickinson School District testified before a legislative committee: "If a family is destitute, not able to provide it [the fee], those children would be brought to school and nobody would know that they didn't pay the fee." *Amicus* State of North Dakota Br. 32a. That promise is not being fulfilled by the current

administration of the district. Now, the destitute are made to sign a contract obligating them to pay the fee or their children will not be bused. No exception or waiver is made. That renders the policy violative of the Fourteenth Amendment.

Respectfully submitted,

EDWARD B. REINHARDT, JR.

Counsel of Record

North Dakota Legal Services, Inc.

P.O. Box 217

New Town, North Dakota 58763

(701) 627-4719

DUANE HOUDER

Legal Assistance of North Dakota

P.O. Box 1893

Bismarck, North Dakota 58502-1893

(701) 222-2110

Counsel for Appellants

AMICUS CURIAE

BRIEF

(11)
No. 86-7113

Supreme Court, U.S.

FILED

JAN 19 1988

JOSEPH P. ANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAULA KADRMAS AND SARITA KADRMAS, A MINOR BY
HER NEXT FRIEND, PAULA KADRMAS, APPELLANTS

v.

DICKINSON PUBLIC SCHOOLS, ET AL.,

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLEES**

CHARLES FRIED

Solicitor General

WM. BRADFORD REYNOLDS

Assistant Attorney General

DONALD B. AYER

Deputy Solicitor General

ROGER CLEGG

Deputy Assistant Attorney General

PAUL J. LARKIN, JR.

Assistant to the Solicitor General

DAVID K. FLYNN

ROBERT J. DELAHUNTY

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

3098

QUESTION PRESENTED

The United States will address the following question:

Whether the user-fee system authorized by North Dakota state law and implemented by the Dickinson Public School system, under which the parents of schoolchildren must pay a graduated, per student, non-waivable fee in order for their children to use the school bus system, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Introduction and summary of argument	7
Argument:	
Appellees' school bus user fee system does not violate the Equal Protection Clause of the Fourteenth Amendment	9
A. A user fee system is a rational, nondiscriminatory means of funding the cost of delivering public goods and services	9
B. North Dakota's system of permitting nonreorganized districts to impose user fees for school bus transportation is rational	11
C. Appellees' school bus user fee system should not be subjected to heightened judicial scrutiny because of the effect that scheme has on the poor	13
Conclusion	23

TABLE OF AUTHORITIES

Cases:

<i>Alcaraz v. Block</i> , 746 F.2d 593 (9th Cir. 1984)	22
<i>Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977)	15
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	16
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	14
<i>Bowen v. Gilliard</i> , No. 86-509 (June 25, 1987)	10, 11
<i>Bowen v. Owens</i> , 476 U.S. 340 (1986)	11
<i>Briggs v. Kerrigan</i> , 431 F.2d 967 (1st Cir. 1970)	22
<i>Califano v. Aznavorian</i> , 439 U.S. 170 (1978)	11
<i>Califano v. Boles</i> , 443 U.S. 282 (1979)	10
<i>City of Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985)	15, 16
<i>Colorado Seminary (Univ. of Denver) v. NCAA</i> , 417 F. Supp. 885 (D. Colo. 1976), <i>aff'd</i> , 570 F.2d 320 (10th Cir. 1978)	22
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	10, 14

IV

Cases—Continued:

	Page
<i>Flemming v. Nestor</i> , 363 U.S. 603 (1960)	11
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	14
<i>Gordon v. Lance</i> , 403 U.S. 1 (1971)	17
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963)	16
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	14
<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663 (1966)	14
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	14, 15, 18, 21
<i>Hazelwood School Dist. v. Kuhlmeier</i> , No. 86-836 (Jan. 13, 1988)	13
<i>Heckler v. Matthews</i> , 465 U.S. 728 (1984)	12
<i>Hernandez v. Texas</i> , 347 U.S. 475 (1954)	20
<i>Idaho Dep't of Employment v. Smith</i> , 434 U.S. 100 (1977)	12
<i>James v. Valtierra</i> , 402 U.S. 137 (1971)	12, 15
<i>Jefferson v. Hackney</i> , 406 U.S. 535 (1972)	10, 16
<i>Maher v. Roe</i> , 432 U.S. 464 (1977)	14, 22
<i>Massachusetts Bd. of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	12
<i>Ortwein v. Schwab</i> , 410 U.S. 656 (1973)	12, 14
<i>Papasan v. Allain</i> , No. 85-499 (July 1, 1986)	21, 22
<i>Personnel Adm'r v. Feeney</i> , 442 U.S. 256 (1979)	15
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	8, 19, 20, 21
<i>Regan v. Taxation With Representation</i> , 461 U.S. 540 (1983)	22
<i>San Antonio Indep. School Dist. v. Rodriguez</i> , 411 U.S. 1 (1973)	13, 14, 18, 19, 20-21, 22
<i>Schweiker v. Hogan</i> , 457 U.S. 569 (1982)	10, 13
<i>Shaffer v. Board of School Directors of the Albert Gallatin Areas School Dist.</i> , 687 F.2d 718 (3d Cir. 1982), cert. denied, 459 U.S. 1212 (1983)	21
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	20, 21
<i>Sutton v. Cadillac Area Public Schools</i> , 117 Mich. App. 38, 323 N.W.2d 582 (1982)	21
<i>Trimble v. Gordon</i> , 430 U.S. 762 (1977)	19
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	16
<i>United States v. Kras</i> , 409 U.S. 434 (1973)	1, 14, 15
<i>Vance v. Bradley</i> , 440 U.S. 93 (1979)	13
<i>Washington v. Davis</i> , 426 U.S. 229 (1976)	15
<i>Weber v. Aetna Casualty & Sur. Co.</i> , 406 U.S. 164 (1972)	19
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	10

V

Constitution, statutes and regulation:

	Page
U.S. Const.:	
Amend. I	22
Amend. XIV:	
Due Process Clause	21
Equal Protection Clause	5-6, 7, 14, 15, 18, 20, 21
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82:	
§ 7005, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a)	2
§ 7601, 100 Stat. 146-147	2
Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552:	
5 U.S.C. 552(a)(2)	1
5 U.S.C. (& Supp. IV) 552(a)(4)(A)	1
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-1891	2
7 U.S.C. (& Supp. IV) 901 <i>et seq.</i>	16
12 U.S.C. (& Supp. IV) 1709(c)	2
26 U.S.C. (& Supp. III) 4251	2
26 U.S.C. (& Supp. III) 4261 <i>et seq.</i>	2
26 U.S.C. (& Supp. III) 5001 <i>et seq.</i>	2
26 U.S.C. (& Supp. III) 5701 <i>et seq.</i>	2
28 U.S.C. (& Supp. III) 1911 <i>et seq.</i>	1
31 U.S.C. 9701	1
42 U.S.C. 254b	16
42 U.S.C. 1395e	2
42 U.S.C. (& Supp. III) 1395/(b)	2
42 U.S.C. 1396o	2
42 U.S.C. (& Supp. III) 1471 <i>et seq.</i>	16
43 U.S.C. 1734	2
43 U.S.C. 1740	2
43 U.S.C. 1764(c)	2
43 U.S.C. (& Supp. III) 1764(g)	2
N.D. Cent. Code (1981 & Supp. 1987):	
§ 15-27.3-10 (Supp. 1987)	3
§ 15-34.2-06.1 (1981 & Supp. 1987)	3, 4
22 C.F.R. Pt. 22	1

Miscellaneous:

Page

OMB Circular No. A-25, <i>User Charges</i> , 52 Fed. Reg. 24890 (1987)	2, 3
Winter, <i>Poverty, Economic Equality, and the Equal Protection Clause</i> , 1972 Sup. Ct. Rev. 41	16

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-7113

PAULA KADRMAS AND SARITA KADRMAS, A MINOR BY
HER NEXT FRIEND, PAULA KADRMAS, APPELLANTS

v.

DICKINSON PUBLIC SCHOOLS, ET AL.,

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLEES**

INTEREST OF THE UNITED STATES

This case presents the question whether a State may condition participation in the use of a publicly provided service on the payment of a "user fee," *i.e.*, a charge paid by an individual for the use of a publicly provided good or service, such as transportation, that also is (or might be) funded by the government from its general revenues. The Court's resolution of that question could affect the federal government in several ways. The federal government by statute conditions access to some federal programs and services on the payment of small but not insignificant fees.¹ Several federal statutes authorize federal agencies to impose user fees.² Also, the federal government provides

¹ See, *e.g.*, *United States v. Kras*, 409 U.S. 434 (1973) (bankruptcy filing fee); 5 U.S.C. (& Supp. IV) 552(a)(2) and (4)(A) (Freedom of Information Act fees); 28 U.S.C. (& Supp. III) 1911 *et seq.* (federal filing fees); 22 C.F.R. Pt. 22 (passport fees).

² See, *e.g.*, 31 U.S.C. 9701 (authorizing heads of federal agencies to charge for "a service or thing of value provided by the agency");

substantial amounts of financial assistance to States for services for which the States are directed or permitted by federal law to require some form of contribution by those who use the service.³ Further, several federal statutes subject certain activities to excise taxes, which are similar to user fees.⁴

Finally, the Office of Management and Budget (OMB) has recently proposed a revision of federal policy authorizing federal agencies to charge for the use of government services or property. OMB Circular No. A-25, *User Charges*, 52 Fed. Reg. 24890 (1987) (proposed July 1, 1987). The proposed policy would require that a user fee be assessed against "each identifiable recipient for benefits derived from federal activities beyond those received by

43 U.S.C. (& Supp. III) 1734, 1740, 1764(c) and (g) (authorizing the Secretary of the Interior to recover reasonable costs of processing right-of-way applications); Section 3401 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1890-1891 (authorizing the Federal Energy Regulatory Commission to impose reasonable user fees); Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 146-147 (authorizing the Nuclear Regulatory Commission to charge reasonable user fees); Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) (authorizing the Secretary of Transportation to impose user fees on pipeline operators transporting hazardous materials).

³ See, e.g., 42 U.S.C. 1395e (Medicare Part A); 42 U.S.C. (& Supp. III) 1395f(b) (Medicare Part B); 42 U.S.C. 1396o (Medicaid); 12 U.S.C. (& Supp. IV) 1709(c) (residential mortgage insurance premium).

⁴ See, e.g., 26 U.S.C. (& Supp. III) 4251 (excise tax on telephone communications); 26 U.S.C. (& Supp. III) 4261 *et seq.* (excise tax on air travel); 26 U.S.C. (& Supp. III) 5001 *et seq.* (excise tax on distilled spirits, wines, and beers); 26 U.S.C. (& Supp. III) 5701 *et seq.* (excise tax on cigars, cigarettes, smoking tobacco, etc.).

the general public." *Ibid.*⁵ The Court's decision in this case could affect the federal government's ability to impose direct or indirect user fees as a condition of participation in federal or federally-funded programs. That result would limit the government's flexibility in conducting these programs and narrow the range of choices open to Congress and federal agencies.

STATEMENT

1. North Dakota state law provides for the consolidation or "reorganization" of local school districts at their option. Reorganization generally tends to expand a district's pupil population and its tax base and to promote larger and more centralized schools. These economies of scale, however, require more students to travel greater distances. Reorganized districts are required under state law to provide cost-free transportation to schoolchildren or to reimburse their travel expenses. N.D. Cent. Code § 15-27.3-10 (Supp. 1987) (*reprinted in J.S. App. A45*). Nonreorganized districts may choose whether or not to provide transportation to schools, and may charge a user fee for any such service. N.D. Cent. Code § 15-34.2-06.1 (1981 & Supp. 1987).

The Dickinson School District is not reorganized (J.A. 36), and has chosen to maintain a school bus transportation system. The system, including a fee schedule, was

⁵ The objectives of this policy are (52 Fed. Reg. at 24890):

- a. To ensure that each service, sale, or use of Government property or resources provided by an agency to specific recipients be self-sustaining;
- b. To promote efficient allocation of the Nation's resources by establishing charges for special benefits provided the recipient that are at least as great as costs to the Government of providing the special benefits; and
- c. To allow the private sector to compete without disadvantage in supplying comparable services, resources, or property where appropriate.

approved by local voters in 1973 (J.A. 33, 36, 44). Bus transportation is available only to students who attend public or parochial kindergarten or elementary schools more than three miles from their homes, or who attend secondary schools more than four miles from their homes (J.A. 33, 36, 44, 45). A graduated transportation fee is charged for bus service to and from school: \$97 per year for one child, \$150 per year for two children, up to a maximum of \$315 for five or more children (J.A. 16, 36, 44). The fee for one-way service or for children attending kindergarten is half the above rate, and no fee is charged to any special education or handicapped student (J.A. 16, 24). The fee does not depend on the distance travelled by individual users, and does not vary with a family's income or ability to pay.⁶ The user fee generates approximately 11% of the total cost for the service, while the remaining 89% comes from state and local tax revenues (J.A. 45, 54).⁷

⁶ The school district's "Transportation Agreement" provides that "[t]he bus fee is due and payable at registration time unless prior arrangements are approved through the administration office" (J.A. 20, 36). It is not apparent from the terms of the agreement whether the provision for "prior arrangements" is designed to allow for either a partial or complete waiver of payments. Appellant Paula Kadrmas testified that she was aware that the \$97 annual fee need not be fully paid in advance, and she, in fact, paid the fee in installments in other years (J.A. 31-32). There was also testimony from a Dickinson School District official that the district tried to accommodate persons who had not fully paid fees from earlier years, and that the district had not gone to court over delinquent fees (J.A. 34).

⁷ For example, in the 1984-1985 school year, the district's busing costs amounted to \$312,147, of which about \$244,000 was defrayed by the State, about \$34,000 was paid from local property taxes, and about \$34,000 was collected through busing fees (J.A. 33-34, 45). State law requires that the total fees collected not exceed the difference between the average cost of the service and the state subsidy. N.D. Cent. Code § 15-34.2-06.1 (1981 & Supp. 1987).

2. The appellants, Paula Kadrmas and her daughter Sarita, a schoolchild enrolled in the Dickinson Public School system in North Dakota, live in a rural area near the town of New Hradec, which is 16 miles from the Roosevelt Public School, where Sarita attends classes. J.A. 35, 43. Appellants' immediate family has a gross income at or near the poverty level, as defined by state eligibility requirements for certain programs (J.A. 36-37, 46). Appellants' family moved to their present residence near New Hradec in 1981 (Appellants' Br. 3), at which time the home-to-school busing service and fee system were in force (J.A. 31). Appellant Paula Kadrmas was aware at the time that Sarita would have to attend school in Dickinson (J.A. 32), and she paid the busing fee in the years before 1985 (J.A. 30, 31).⁸

Appellants refused to pay the busing fees for the 1985-1986 school year and were therefore denied transportation. Appellants made private transportation arrangements during the school year, and appellant Sarita Kadrmas attended school on a regular basis throughout the year (J.A. 32, 37; see J.A. 45). Apart from their co-plaintiffs (who are no longer parties here), no other Dickinson School District parent refused to pay the busing fee, and no child was denied the opportunity to attend public school (J.A. 37).

3. Appellants brought suit in North Dakota state court, alleging that the state's policy of permitting non-reorganized districts to charge fees for transportation to public schools violated the state and federal constitutions. The trial court rejected several state constitutional challenges to the scheme adopted by the state legislature (J.A. 38-41). It also rejected appellants' claims that the user fee system violated the Equal Protection Clause of the

⁸ Paula Kadrmas was, however, in arrears for prior years (J.A. 47).

Fourteenth Amendment.⁹ The transportation fee charged by the Dickinson School District was rational, the court explained, because the amount of fees collected may not exceed the actual cost of the transportation less the amount subsidized by the State, and because the graduated fees charged to families of schoolchildren was a reasonable way to charge for use of the bus service (J.A. 41).

The Supreme Court of North Dakota, by a divided vote, affirmed (J.A. 53-68). It ruled that appellants did not have the right under the state constitution to free transportation to and from public school (J.A. 54-61). As the court explained, "transportation is not a necessary element of the educational process, and it is not an integral part of the educational system to which the [state] constitution refers in requiring the Legislature to provide 'a uniform system of free public schools' " (J.A. 60). The court also found that the provisions of state law did not violate the Equal Protection Clause of either the state or federal Constitution, concluding that the user fee system was a rational means of funding public services and did not unconstitutionally discriminate against indigents or against the residents of nonreorganized school districts (J.A. 61-65). "A statutory scheme under which a school district offers to provide student transportation at considerably less expense to the parent than self-transportation would entail does not constitute a deprivation which offends either federal or state equal protection rights" (J.A. 63). The difference between reorganized and nonreorganized school districts was also "rationally related to a legitimate govern-

⁹ The court concluded that the difference between reorganized and nonreorganized school districts was not irrational, and ruled that the user fee system did not unconstitutionally discriminate against appellants on the basis of wealth (J.A. 40-41). The court treated only the second of these issues as having been raised under the federal Constitution (J.A. 41).

ment purpose," because its "obvious purpose" was "to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system" (J.A. 64).¹⁰

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants offer a constitutional proposition which is at once novel and alarming in its implications for the authority of governments to choose both the objects of public expenditures and the means of financing them. If appellants are correct, then any uniform exaction—here, a user fee, but the point would hold as well for sales taxes, excise taxes, or any nonprogressive tax in general—may run afoul of the Equal Protection Clause because such an exaction bears more heavily on those with less resources to meet it. Indeed, appellant's proposition would be applicable as well even to graduated income tax schemes, since a question might always be raised as to the degree of progressivity and the appropriateness of including or excluding some system of exemptions.

A fee uniformly charged to all users of a particular good or service does not discriminate against those with less resources just because such a fee is harder to bear as one has less money to bear it. That a good or service is provided by some unit of government carries no general constitutional obligation that it be provided free of charge and financed out of general revenues. Nor can a contrary conclusion be made more plausible by suggesting that those with less resources are pro tanto a suspect category so that measures which may be thought to bear more heavily on them must carry some special burden of justification. Not

¹⁰ The dissent concluded that free school transportation is not constitutionally required, but found that the application to appellants of the appellees' school bus user fee violated the state constitution (J.A. 65-68).

only is financial capacity a matter of infinite gradations so that the usual terms of equal protection analysis have no way to take a logical grip, but also any such proposition could not be confined to user fees but would have to extend to any governmental exaction.

There are some facilities which government is obligated to make available without charge to those unable to pay for them: *e.g.*, defense counsel in a criminal prosecution, transcripts in a criminal appeal, and access to court where, as in divorce, government controls a person's status. Bus transportation to and from school bears none of the indicia whereby such provision is constitutionally mandated. The government here is not acting coercively towards an individual or determining his legal status. Nor does *Plyler v. Doe*, 457 U.S. 202 (1982), support appellants' claim. In *Plyler*, the children were complaining of a non-uniform fee which specifically discriminated against a class with several characteristics of a suspect category, and in the context of such discrimination the right to education assumed sufficient significance to vitiate the explicitly discriminatory scheme. Here, the scheme is nondiscriminatory on its face, and both the class and any discrimination must be found in the unintended differential burden a uniform fee imposes on a person with less ability to pay.

Whatever the constitutional status of the right to a primary or secondary education, such a right cannot be thought to be implicated here. The user fee in question is not imposed on school attendance but on transportation to and from school. While it is obviously true that reaching school is a precondition to attending school, no decision of this Court has ever suggested that such preconditions to the enjoyment of a right must be subsidized to the same extent that the right itself must be accorded. That is understandable; just as a child's enjoyment of educational opportunities is impaired by difficulties in reaching

school, so, too, they are impaired by poor diet, clothing, and living conditions. Yet the delivery of these goods is a matter of the community's political, not its constitutional, obligations, and it would be odd, to say the least, to single out school bus transportation for special judicial attention.

ARGUMENT

APPELLEES' SCHOOL BUS USER FEE SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. A User Fee System Is A Rational, Nondiscriminatory Means Of Funding The Cost Of Delivering Public Goods And Services

In a mixed private and public economy, the government will oftentimes decide to supply a particular service, such as transportation, either as a competitor to the private sector (*e.g.*, buses) or as a monopolist (*e.g.*, subways or bridges). Public services can be paid for in several ways. Government can use the income received from general tax revenues or from the sale of public bonds, it can spend the income generated from the sale of other publicly controlled goods (such as licenses), it can charge a fee to cover the costs of delivering a service, or it can apply a combination of the above approaches. Government can also adopt one approach to pay for the construction or establishment of a public facility (such as issuing bonds to pay for the cost of building a bridge), but use a different means of covering the cost of operating and maintaining that facility (such as charging a toll).

Decisions whether and how much of a service to provide, and how any such service will be funded, are the stuff of the democratic political process. Choices among competing priorities are possible only on an assessment of public preferences based on the perceived needs of a particular political unit. There is no one correct way to make

these trade-offs, and any resolution will unavoidably be favored by some and disfavored by others. Government therefore must have considerable latitude in accommodating these needs. As the Court explained in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (citation omitted), "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

A user fee system does not "classify" among or "discriminate" against any category of individuals. A flat user fee treats everyone alike (as does a sales tax). As long as a user fee system is not applied in a manner that arbitrarily singles out a particular person or class of individuals (see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)), a user fee system does not "discriminate" on any ground other than the uncontroversial principle that those who benefit from a service may be asked to pay for it.

Even if a user fee system does classify among individuals in some way, such a system is nonetheless valid under the Constitution. The Court has consistently recognized that, absent a convincing reason to believe that the normal operation of the political process has been unconstitutionally skewed, decisions about how to collect or spend public revenues should be left to the political branches of government. It is well settled that social welfare legislation—*i.e.*, legislation implementing political decisions allocating the benefits and burdens of government's fiscal and social policy—need withstand only a minimal level of scrutiny in order to survive a due process or equal protection challenge. *E.g.*, *Bowen v. Gilliard*, No. 86-509 (June 25, 1987); *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, *supra*. Governments have the widest latitude to "concentrate limited funds where the need is likely to be greatest" (*Califano v. Boles*, 443 U.S. 282, 296 (1979)), and where the benefits of public expendi-

tures are likely to be most fruitful. The decisions implemented in social welfare legislation will therefore be sustained as long as the legislature's judgment is not patently arbitrary. *E.g.*, *Bowen v. Gilliard*, slip op. 10-11; *Bowen v. Owens*, 476 U.S. 340 (1986); *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Flemming v. Nestor*, 363 U.S. 603 (1960).

A user fee system for financing part of the cost of the goods and services that government delivers is clearly valid under the Constitution because it rationally combines elements of public finance and private choice. It places an increased share of the cost of such service on those who most directly benefit from it, and thus lowers the tax burden which must otherwise be borne by the general public. By looking for payment to those persons who use a service, a user fee system, by definition, operates in a rational manner. As in the operation of the private market, a user fee system tends to minimize the commitment of resources to activities whose cost exceeds their social utility.

B. North Dakota's System Of Permitting Nonreorganized Districts To Impose User Fees For School Bus Transportation Is Rational

1. A school bus transportation user fee is clearly an example of rational public financing. It has never been claimed that local governments are constitutionally required to create a transportation system for schoolchildren (or the general public) at all, or that they are required to subsidize the use of private bus services. Municipalities can channel their funds into other programs and leave to parents the responsibility for transporting their children to school. If the government does decide to operate a bus service itself in order, for example, to serve areas that existing bus lines will not reach, it follows that the government should be allowed the choice whether to pay for that

service out of its general tax revenues, or by a fee charged to the persons who use that service, or (as here) through some combination of the two.

Thus, the North Dakota Supreme Court correctly held that the user fees were "rationally related to the legitimate governmental objective of allocating limited resources" (J.A. 64). In placing a small portion of the cost of bus transportation on those who use that service, the user fee system allows limited funds to be spent elsewhere.¹¹ The North Dakota Supreme Court was also correct in characterizing the challenged busing policy as "purely economic legislation" (J.A. 65). Its decision is consistent with the decisions of this Court deferring to the social and economic policy judgments of state and local governments. See, e.g., *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *James v. Valtierra*, 402 U.S. 137 (1971).

2. The State has also articulated a rational basis for the existence of two types of school districts: reorganized districts, which must provide free transportation, and nonreorganized districts, which need not provide transportation and may charge a fee if they choose to provide it. That scheme is the result of two competing sets of concerns, both of which influenced the State legislature. On the one hand, the legislature had an interest in encouraging reorganization, because it would expand the physical size, pupil populations, and tax bases of school districts, thus improving their operational and fiscal soundness. Such reorganization would result in larger, more cost-efficient central schools. The location of such schools, however, would often require children to travel

¹¹ See, e.g., *Heckler v. Matthews*, 465 U.S. 728 (1984) (sustaining amendments to social security program primarily designed to hold down costs); *James v. Valtierra*, 402 U.S. 137, 143 (1971); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

greater distances, thus justifying the mandatory provision of free bus transportation in order to make the reorganization plan acceptable to many parents (State's Mot. to Dismiss 12). On the other hand, the legislature chose not to make reorganization mandatory. The legislature allowed nonreorganized districts to exist as a matter of local option, and left such nonreorganized districts free to make their own decisions about whether to provide bus transportation and whether to charge for such transportation as they do provide.

Although appellants might have preferred a centrally-imposed, uniform system for all school districts, the State did not act irrationally in trying to accommodate those localities that still desire, in view of their particular circumstances, to remain unconsolidated. Cf. *Hazelwood School Dist. v. Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 12; *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-53 (1973). The fact that an accommodation of local preferences results in differential treatment of persons in reorganized and nonreorganized districts does not render the overall scheme irrational; "the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected most harshly by its terms." *Schweiker v. Hogan*, 457 U.S. at 589; see also *Vance v. Bradley*, 440 U.S. 93, 108-109 (1979). The question is whether the underlying state policy is rational. The state's policy here meets that test.

C. Appellees' School Bus User Fee System Should Not Be Subjected To Heightened Judicial Scrutiny Because Of The Effect That Scheme Has On The Poor

Appellants and amici contend that the user fee system must pass heightened judicial scrutiny, because it imposes

a financial burden on lower-income rural families,¹² and because it unjustifiably hampers their ability to enjoy a free public education. Neither claim has merit.

1. Appellants' claim that the evenhanded application of this user fee has an adverse impact on indigents plainly falls far short of asserting a constitutional violation. This Court has consistently rejected arguments that indigency is a suspect category and that economic legislation is unconstitutional under the Equal Protection Clause if its impact varies with differences in financial resources. See, e.g., *Harris v. McRae*, 448 U.S. 297, 322-323 (1980); *Maher v. Roe*, 432 U.S. 464, 470-471 (1977); *Rodriguez*, 411 U.S. at 24, 28; *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *United States v. Kras*, 409 U.S. 434, 446 (1973); *Dandridge v. Williams*, *supra*. Although there are particular instances where the government may affect personal rights in a direct way, so that the government may be constitutionally required to forgo charging a fee at all, to waive an otherwise uniform fee, or to provide funds to assure that indigents are not foreclosed from participating fully in a particular process (e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce filing fees); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll taxes); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defense counsel in a criminal prosecution); *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcript of criminal trial)),

¹² Although appellants do not couch their argument in precisely those terms, we believe that the above description is a fair reading of their claim (Br. 20) that "[a]t the heart of this challenge is the fact that North Dakota is punishing a group of students, who bear no responsibility for their status, nor have the means to change it, in an effort to coerce the district to organize and expand." Appellants therefore seem to claim that the State's classification is invalid because, for insufficient reasons, it discriminates against a class defined, at least in part, by "immutable" characteristics similar to those associated with a "suspect" category. That claim, in turn, amounts to an assertion that the class in question is "quasi-suspect."

those instances are extremely limited. See *Harris v. McRae*, *supra* (no right to funding for abortion); *United States v. Kras*, *supra* (no right to a waiver of filing fees for voluntary bankruptcy).

Indeed, a user fee system would be valid even if it had an adverse economic effect on a racial minority—unless the government "selected or reaffirmed" the fee "at least in part 'because of,' not merely 'in spite of,' its adverse effects" upon that minority. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); see also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). It follows *a fortiori* that a user fee is not unconstitutional for the reason alone that—like any uniform pricing mechanism—it has an adverse economic impact on those with less resources.¹³

Any other conclusion would be a major departure from this Court's precedents holding that social and economic legislation need only be rational to survive an equal protection challenge. There exists an extensive body of legislation intended to benefit the urban and rural poor, which strongly militates against treating indigency as a suspect or a quasi-suspect category. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 443-444 (1985).¹⁴ Nor

¹³ The Court has ruled that legislation that on its face imposes a restriction measured by lower income status is not invalid under the Equal Protection Clause if it is rationally defensible. In *James v. Valtierra*, *supra*, the Court sustained a state constitutional requirement that low-income housing projects be approved by a majority of the voters at a community referendum. This Court ruled that the state procedure "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." 402 U.S. at 143 (footnote omitted).

¹⁴ "Hour and wage legislation, legislation protecting collective bargaining, social security, the farm program, the creation of the Office of Economic Opportunity, fair employment laws, manpower training programs, unemployment compensation, public assistance,

are indigents so politically powerless as to comprise a "discrete and insular" minority that is unfairly denied an opportunity to form successful electoral coalitions.¹⁵

Finally, unlike race, poverty is neither an "immutable" characteristic nor one that is even defined by any well-established, discernible contours. Although there are different statutory and administrative determinations, such as state eligibility tests that place appellants here at or near the "poverty line" (Appellants' Br. 4; cf. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 445), these determinations can (and do) vary with the purpose for which they are made (cf. *Jefferson v. Hackney*, *supra*), and with the legislature, agency, or jurisdiction that makes them. It would be incongruous to treat such shifting and uncertain boundaries as defining a constitutionally "suspect" or "quasi-suspect" class.

Treating wealth disparities as a suspect classification, and viewing user charges as discriminatory in relation to that classification, would open to constitutional and therefore judicial scrutiny a vast amount of legislation, from gasoline taxes to utility charges or driver's license

public housing, public education, subsidiz[ed] health care, etc., have all had as their rationale at one time or another the need to help the poor." Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 Sup. Ct. Rev. 41, 98. Other federal programs designed to benefit the rural poor include funding for rural electrification, see 7 U.S.C. (& Supp. IV) 901 *et seq.*, aid for farm housing, see 42 U.S.C. (& Supp. III) 1471 *et seq.*, and health care for migrant agricultural workers, see 42 U.S.C. 254b.

¹⁵ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); cf. *City of Cleburne v. Cleburne Living Center, Inc.*, 472 U.S. at 445. Until fairly recently, rural voters, including the rural poor, enjoyed a built-in legislative advantage over urban dwellers, since rural communities were typically (albeit unconstitutionally) overrepresented in the political process. See *Baker v. Carr*, 369 U.S. 186, 248 n.4 (1962) (Douglas, J., concurring); *Gray v. Sanders*, 372 U.S. 368, 379 (1963); *id.* at 386 (Harlan, J., dissenting).

license fees, all of which bear more heavily on those with fewer resources. Indeed, all legislative choices regarding the redistribution of wealth—including the decision to do nothing¹⁶—would fall within the sweep of the principle appellants must advance to sustain their challenge to this scheme.

Judicial attempts to remedy the disparate impact on the poor of legislation such as that involved here could be ineffective, if not counterproductive. Mandating transfer payments in order to protect one class of recipients could have unintended harmful effects on the beneficiaries of other equally desirable social programs. For example, a decision to invalidate appellee's user fee policy would leave appellees with a variety of possible responses, some of which could much further worsen the situation of the rural poor. Appellees might reduce expenditures on other educational or social services. Appellees might discontinue school bus service altogether, or eliminate home-to-school service and resume station-to-school service for all children. Or they might limit qualification for free bus service to some defined degree of indigency. And if appellees chose to offset the revenue loss by increasing taxes, that decision (depending on the form of tax chosen) might increase the burden on all taxpayers, including the poor—unless appellants were to pursue the logic of their argument to its extreme and demand judicial scrutiny of the scope and progressivity of particular tax schemes.¹⁷

¹⁶ Legislative "inactions" may also have a discernible wealth-based impact without being constitutionally invalid. Cf. *Gordon v. Lance*, 403 U.S. 1 (1971) (a state can constitutionally require referendum approval by a supermajority of voters before deciding to incur bonded indebtedness).

¹⁷ Appellants contend (Appellants' Br. 27) that there are "many viable alternatives to non-waivable busing fees." But even if appellants were right that their preferred alternatives would be better public policy than the system chosen by local voters, it does not follow that

In the final analysis, appellants' argument that they have the right to be exempted from a user fee requirement because of the financial burden that fee imposes on the poor is practically indistinguishable from a claim that appellants have a substantive constitutional right to an income transfer in the amount of that fee. Put another way, appellants' claim is essentially identical to a claim by any parent who lives at the poverty level that he has a substantive constitutional right to subsidized bus or subway tokens so that his children can ride to public school. Providing free transportation to and from school may be sound social policy, but it is not one to which the Equal Protection Clause is addressed. See *Harris v. McRae*, 448 U.S. at 326.

2. Appellants attempt in various ways (Appellants' Br. 13-17, 22, 24-25) to predicate their claim of a federal constitutional violation upon the fundamental place of education in society and under state law. This Court's decisions concerning the funding of public education, however, do not suggest that the user fee system at issue here should be examined under anything other than a test of minimum rationality. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court considered the constitutionality of Texas' system of financing the operation of its public schools in part from local sources of revenue, particularly property taxes. Due to this funding system, there were substantial interdistrict disparities in public school expenditures. In rejecting an equal protection challenge to the state's system of public school finance, this Court rejected the claims that wealth is a suspect category and that education is a fundamental right. 411 U.S. at 18-40. Instead, the Court held that a

the user fee is so "irrational" as to be unconstitutional. Moreover, a decision that the user fee was unconstitutional would not bind the appellees to choose one of the options that appellants have sketched. Appellees might instead select one of the alternatives we have mentioned above.

school financing scheme is constitutional if it bears "some rational relationship to a legitimate state purpose." *Id.* at 44. The Texas school financing system was valid, the Court concluded, because it permitted and encouraged a large measure of local control over public school education.

Nor does this Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982), support appellants. In *Plyler*, the Court held that the complete denial of state funding for, and the imposition of a tuition charge on, illegal alien schoolchildren was unconstitutional. In so ruling, the Court applied an intermediate level of scrutiny to the state scheme. *Id.* at 217-218 & n.16, 223-224, 230; *id.* at 232-235 (Blackmun, J., concurring); *id.* at 238-240 (Powell, J., concurring). The classification that led to that scrutiny, however, was the status of the students as children of parents who had entered the country illegally; unlike the children here, they alone were charged tuition. The Court therefore drew an analogy to the cases in which it had applied an intermediate level of scrutiny to classifications based on illegitimacy, because illegal alien schoolchildren were also penalized by the tuition fee for the misconduct of their parents.¹⁸ Moreover, in addition to being illegal aliens, the children in *Plyler* were part of several different and overlapping classes, each of which bore some of the historical attributes of a "suspect" category. They were predominantly Mexican, a category defined by national origin that has persistently encountered discrimination in

¹⁸ *Plyler*, 457 U.S. at 220 (citing *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972)); *Plyler*, 457 U.S. at 238 (Powell, J., concurring) ("[t]he classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents").

Texas. See *Hernandez v. Texas*, 347 U.S. 475, 479-480 (1954). They were minors, and thus unable to vote, and the form of vicarious representation ordinarily available to minors—parental suffrage—was not (and could not become) available to them, because their parents were illegal aliens. Because the Court reasonably expected the children to remain in this country, the stigma of lasting illiteracy, which the Court foresaw as the result of the state's imposition of tuition fees (*Plyler*, 457 U.S. at 223), threatened to make the children into a permanent underclass, in violation of the Fourteenth Amendment's intent to abolish caste legislation. See *id.* at 213 ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

Appellants also rely on the bootstrap argument that public education triggers heightened judicial scrutiny under the federal constitution because it is a fundamental right and the object of great public attention under North Dakota law.¹⁹ Public education, however, is not a fundamental right guaranteed by the federal constitution (*Rodriguez*, 411 U.S. at 35-37; *Plyler*, 457 U.S. at 221, 223), and it cannot be made so by the way it is treated under state law. Whether a "right" is fundamental under the federal Constitution turns on whether it is "explicitly or implicitly guaranteed by the Constitution." *Rodriguez*,

¹⁹ Appellants appear to suggest that education, although not a fundamental right under the federal Constitution, is sufficiently important to be ranked as a "quasi-fundamental" right. The Court has quite properly never held that there exists such a category as "quasi-fundamental" rights. See *Rodriguez*, 411 U.S. at 31 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting) ("If the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone far toward making the Court a 'super-legislature.'")).

411 U.S. at 33-34. Moreover, under appellants' theory, the federal constitution would require a state to spend additional funds on public education precisely because the state is itself constitutionally committed to education and already spends generously on educational programs. That outcome would perversely restrict the ability of state and local governments to control funding and operation of a public school system.

Assuming an affirmative answer to a question that the Court has left open—whether programs resulting in the denial of a minimally adequate education must be subjected to heightened constitutional scrutiny²⁰—it does not follow that the government is constitutionally required to subsidize any facility associated with the enjoyment of educational opportunities. Such constitutionally guaranteed facilitation would surely have to extend to include the provision of food, clothing, shelter, and other prerequisites to the ability to make use of educational opportunities. No decision of this Court remotely supports such a proposition, and the case law is, in fact, to the contrary. *Harris v. McRae*, 448 U.S. at 316 ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category."). See *Shaffer v. Board of School Directors of the Albert Gallatin Areas School Dist.*, 687 F.2d 718 (3d Cir. 1982), cert. denied, 459 U.S. 1212 (1983) (neither the Due Process nor the Equal Protection Clause requires government to provide free transportation to and from public school); cf. *Sutton v. Cadillac Area Public Schools*, 117 Mich. App. 38, 323 N.W.2d 582 (1982) (same result

²⁰ See *Papasan v. Allain*, No. 85-499 (July 1, 1986), slip op. 19; *Rodriguez*, 411 U.S. at 23, 25 n.60, 36-37; see also *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring) ("classifications involving the complete denial of education are in a sense unique"); *Shapiro v. Thompson*, 394 U.S. at 633.

under state constitution); see also, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540, 545-549 (1983) (government is not required to fund the exercise of First Amendment rights); *Maher v. Roe, supra* (upholding a state's decision to fund the expenses of childbirth but not abortion).²¹

Finally, the fact that free bus transportation is provided in some but not all districts does not render the state financing scheme invalid. It is clear that the Constitution is not violated by even significant variations in the quality of teachers, school facilities, and the like. *Rodriguez*, 411 U.S. at 36. It follows that interdistrict differences in the provision of free school transportation (or other services, such as vaccinations or school lunches) is plainly constitutional, at least where, as here, they stem from variations in school funding and local spending decisions. *Id.* at 49; see *Papasan v. Allain*, No. 85-499 (July 1, 1986), slip op. 21.

²¹ The case law seems generally to agree that programs relating to such education-related benefits are not constitutionally suspect because they have disparate wealth-based effects. For instance, the courts have held that it does not deny equal protection for a school lunch program to operate so as to favor schools with existing kitchen facilities (and hence, assertedly, with greater resources), see *Briggs v. Kerrigan*, 431 F.2d 967, 969 (1st Cir. 1970); or for the antifraud regulations governing a school meals program to work an incidental hardship on households of poor illegal aliens, see *Alcaraz v. Block*, 746 F.2d 593, 604-606 (9th Cir. 1984); or for NCAA regulations to bar certain types of outside aid for participants in intercollegiate athletic programs, despite the claimed adverse impact on those participants from poor rural backgrounds, see *Colorado Seminary (Univ. of Denver) v. NCAA*, 417 F. Supp. 885, 897-898 (D. Colo. 1976), *aff'd*, 570 F.2d 320, 321 (10th Cir. 1978).

CONCLUSION

The judgment of the Supreme Court of North Dakota should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

DAVID K. FLYNN
ROBERT J. DELAHUNTY
Attorneys

JANUARY 1988

AMICUS CURIAE

BRIEF

DEC 2 1987

ROBERT F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PAULA KADRMAS and SARITA KADRMAS, a minor
by her next friend, Paula Kadrmas,

Appellants,

—v.—

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his capacity as Superintendent of the Dickinson Public Schools; CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON, HAROLD KRIEG, HERB HERAUF, in their capacity as members of the Dickinson School Board; RICHARD RYKOWSKY, in his capacity as Transportation Supervisor of the Dickinson Public Schools,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

**BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION AND THE NORTH
DAKOTA CHAPTER OF THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION IN SUPPORT OF APPELLANTS**

C. EDWIN BAKER
(Counsel of Record)
JOHN A. POWELL
HELEN HERSHKOFF
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ROBERT VOGEL
North Dakota Chapter of the
American Civil Liberties Union Foundation
P.O. Box 1376
Grand Forks, North Dakota 58206-1376
(701) 775-3117

65 p

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
STATEMENT OF CASE.	3
SUMMARY OF ARGUMENT.	6
ARGUMENT	9
I. DISCRIMINATION ON THE BASIS OF WEALTH IN ACCESS TO A BASIC PUBLIC EDUCATION VIOLATES EQUAL PROTECTION.	9
A. Physical Access is an Aspect of a Basic Public Education. .	11
B. The State Bears Special Responsibility for the Transportation Burden Imposed on Children Living Far From School.	18
C. The State Cannot Deny A Basic Education On Grounds Of Wealth.	26
II. THE STATE CANNOT CONDITION ACCESS TO A GENERALLY PROVIDED BASIC PUBLIC EDUCATION ON THE PAYMENT OF A FEE.	34

III. DENIAL OF FREE TRANSPORTATION TO CHILDREN IN NONREORGANIZED DISTRICTS IS IRRATIONAL AND INVIDIOUS	42
A. Geographical Discrimination That Could Result In A Complete Deprivation Of Education Should be Subject to Heightened Review.	42
B. The Discrimination Between Districts Serves no Substantial or Even Rational, Legitimate State Purpose.	47
C. The One pruported State Purpose Is Neither Substantial Nor Legitimate But Rather Is Impermissibly Invidious. . . .	50
CONCLUSION	57

TABLE OF AUTHORITIES

Cases

<u>Bearden v. Georgia</u> , 461 U.S. 660 (1983)	34
<u>Bismark School District V. Walker</u> , 370 N.W.2d 565 (N.D. 1985)	5
<u>Board of Education v. Rowley</u> , 458 U.S. 176 (1982)	38
<u>Boddie v. Connecticut</u> , 401 U.S. 371 (1971)	<u>passim</u>
<u>Brown v. Board of Education</u> , 347 U.S. 483 (1954)6, 23, 25
<u>Cleburne v. Cleburne Living Center, Inc.</u> , 473 U.S. 432 (1985)	55, 56
<u>Doe v. Plyer</u> , 458 F.Supp. 569 (1978)	36
<u>Evans v. Cornman</u> , 398 U.S. 419 (1970) .	43
<u>F. S. Royster Guano Co. v. Virginia</u> , 253 U.S. 412 (1920)	57
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956)	14, 15, 18
<u>Harper v Virginia Board of Elections</u> , 383 U.S. 663 (1966)	35, 37, 42
<u>Harris v. McRae</u> , 448 U.S. 297 (1980)	23, 24

<u>Kadrmaz v. Dickinson Public Schools,</u> 402 N.W.2d 897 (N.D. 1987)	<u>passim</u>
<u>Lassiter v. Northampton County Board of Elections,</u> 369 U.S. 45 (1959)	37
<u>Lintz v. Bd. Education,</u> 325 N.W.2d 803 (Mich. 1982)	32
<u>Mills v. Board of Education of the District of Columbia,</u> 348 F.Supp. 866 (D.D.C. 1972)	39
<u>Missouri v. Lewis,</u> 101 U.S. 22 (1880)	44
<u>Papasan v. Allen,</u> 106 S.Ct. 2932 (1986)	44, 45, 46, 49, 51
<u>Parker v. Levy,</u> 411 U.S. 978 (1973)	43
<u>Plyler v. Doe,</u> 457 U.S. 202 (1980).	<u>passim</u>
<u>Reynolds v. Sims,</u> 377 U.S. 533 (1964)	43
<u>Oregon v. Mitchell,</u> 400 U.S. 112 (1970).	37
<u>Roe v. Wade,</u> 410 U.S. 113 (1973)	25
<u>San Antonio School District v. Rodriguez,</u> 411 U.S. 1 (1973)	<u>passim</u>
<u>Slaughter-House Cases,</u> 83 U.S. (16 Wall.) 36 (1873)	44

<u>Tate v. Short,</u> 401 U.S. 395 (1971)	24, 34
<u>United States v. Kras,</u> 409 U.S. 434 (1973)	16, 19, 20
<u>Weber v. Aetna Casualty & Surety Co.,</u> 406 U.S. 164, 175 (1972)	55
<u>Williams v. Illinois,</u> 399 U.S. 235 (1970)	34
 <u>Constitution</u>	
U.S. Const. Amend XIV.	<u>passim</u>
 <u>Statutes</u>	
Education For All Handicapped Children Act of 1975, Pub.L. 94-142	
Sec. 3(b)(9).	38
Sec. 3(c),	38
Sec. 4(a)(4), 20 U.S.C. Sec. 1401 (17)& (18)	38
Section 15-27.3-10, N.D.C.C.	3, 22, 43
Section 15-34.1-01, N.D.C.C.	34
Section 15-34.1-05, N.D.C.C.	34
Section 15-34.2-02, N.D.C.C.	10
Section 15-34.2-06.1, N.D.C.C.	3, 10, 22, 30, 43, 52

Section 15-27.3-10, N.D.C.C.	3, 22
1890 N.D. Sess. Laws, Ch. 62, Sec. 83. .	23
1971 N.D. Sess. Laws, Ch. 158, Sec. 5. .	33

Other Authorities

S. Rep. No. 94-168, 94th Congress, 1st Sess., 23, <u>reprinted in U.S.Code Cong. & Admin.News</u> 1975, 1447.	39
--	----

<u>Annotation: Validity of Exaction of Fees From Children Attending Elementary or Secondary Public Schools,</u> 41 ALR3d 752	28
---	----

<u>Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection,</u> 131 U.Pa.L.Rev.933 (1983) .	13
---	----

<u>Dellinger, The Unresolved Status of Public School Fees,</u> 9 School Law Bulletin 1 (April, 1978)	28
---	----

<u>Neuman, Territorial Discrimination, Equal Protection, and Self-Determination,</u> 135 U.Pa.L.Rev. 261 (1987)	43, 49
--	--------

<u>State Legal Standards For the Provision of Public Education: An Overview</u> 73 (Dept. of Health, Education and Welfare, 1978)	21
---	----

INTEREST OF AMICUS^{1/}

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the principles of liberty and equality embodied in our Constitution. The ACLU has appeared before this Court on numerous occasions representing parties or as amicus curiae.

This case presents the issue of whether the government may charge a fee that could directly limit access to education on the basis of wealth. Moreover, because the governemnt charges fees in certain districts and not others,

^{1/} The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

this case also involves geographical discrimination in the provision of access to education.

The ACLU has an interest in the non-discriminatory provision of a basic education as required by the Fourteenth Amendment. Because the ACLU believes that the busing fees and the North Dakota statutory provision challenged in this case conflicts with constitutional requirements, we submit this brief in support of appellants and urge reversal of the judgment below.

Statement of Case

North Dakota is a large plains state with a geographically dispersed population.^{2/} It has long provided bus transportation to bring children to school. Since 1978, however, it has allowed nonreorganized districts to charge a fee for school bus service. Section 15-34.2-06.1, N.D.C.C. In contrast, reorganized districts are required to make provision for transportation free of charge. Section 15-27.3-10, N.D.C.C. See Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897, 903 (N.D. 1987).

Sarita Kadrmas lives near New Hradec, North Dakota. When this litigation began, she was a fourth grade student in Roosevelt

^{2/} Unless otherwise noted, the facts summarized in this Statement are drawn from the Findings of Fact included in the district court opinion below.

Elementary School in Dickinson, which is located about sixteen miles from her home. The Dickinson Public School District is a nonreorganized district under North Dakota Law. It charges \$97 a year for schoolbus service, which is provided to elementary students who live more than three miles from school, and for secondary school students who live more than four miles from school. By contrast, the District provides free bus transportation for school teams participating in athletic events. Tr.Transcript, 117, 121-22.

Sarita was denied bus service during the 1985-86 school year solely because her mother, Paula Kadrmas, refused to sign an agreement obligating her to pay the \$97 fee. Sarita's family had a gross income at or near the poverty line and had outstanding debts, including debts to the

District for bus transportation in prior years.

The District has never waived nor reduced a transportation fee on grounds of poverty, and a waiver was neither requested nor offered in this case. Under state law, only by refusing to sign were plaintiffs allowed to challenge the fee, Bismark School District V. Walker, 370 N.W.2d 565 (N.D. 1985), which they did.

The North Dakota Supreme Court rejected all of petitioner's claims. It specifically held that the fee does not violate the equal protection clause of the Fourteenth Amendment by creating an unconstitutional wealth discrimination or by discriminating against children living in nonreorganized districts. Kadrmas, supra, 402 N.W.2d at 902-04.

SUMMARY OF ARGUMENT

This court has repeatedly recognized that "education is perhaps the most important function of state and local government. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all in equal terms." Brown v. Board of Education, 347 U.S. 483, 493 (1954) (emphasis added), quoted in San Antonio School District v. Rodriguez, 411 U.S. 1, 29-30 (1973); Plyler v. Doe, 457 U.S. 202, 222-23 (1980). Education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Plyler, supra, 457 U.S. at 221. Moreover, "denial of

education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." Plyler, 457 U.S. at 221-22.

The North Dakota law challenged here presents three equal protection problems identified by this Court. It threatens an isolated group of children with a complete denial of education. It imposes a "governmental barrier" to the receipt of a basic education. And it fails to make a free public education available to all on equal terms.

First, the school bus fee, without provision for waiver on grounds of poverty, threatens to deprive a category of children of a public school education

because of their poverty and residence. This denial could only be justified by a substantial goal of the state, but no such goal is suggested. Moreover, by its choice of the location of the school, the government imposes the need for vehicular transportation on some children but not on others. The state's responsibility for the obstacle placed in the path of these children's education heightens the inequity of this discrimination.

Second, the government may not legitimately use a fee to ration access to certain opportunities, such as the vote and a basic education. A fee for access to a basic education is a type of governmentally imposed barrier that is an affront to the goals of equal protection.

Third, North Dakota denies equal access to education by allowing

nonreorganized districts but not reorganized districts to charge a fee for busing. No substantial or even rational state purpose justifies this discrimination. It does not promote the interest in local self-government that is invoked to support local property tax financing. Nor is the discrimination a rational or necessary means of promoting school district reorganization. Finally, this discrimination invidiously harms children in nonreorganized districts living far from school, thereby sacrificing their interest in equal access to education.

ARGUMENT

I. DISCRIMINATION ON THE BASIS OF WEALTH IN ACCESS TO A BASIC PUBLIC EDUCATION VIOLATES EQUAL PROTECTION

In Rodriguez, this Court suggested that the absolute denial of a public

education, based only on poverty of a student's family, could violate the equal protection guarantees of the Fourteenth Amendment. It noted that such a denial would be created by charging a fee for an education. In this case, respondents charge a fee for the bus transportation that for some students is necessary in order to receive an education. This fee is offensive to equal protection for two interrelated reasons.

First, physical access to school is an essential part of a basic or minimally adequate public education. For those children who cannot walk or bicycle to school, car or bus transportation is necessary.^{1/} Second, a state cannot refuse

^{1/} In some circumstances North Dakota makes a lodging payment for children who live far from school or attend school in another district. See, e.g., Sections 15-34.2-02 and 15-34.2-06, N.D.C.C.

to provide children with a generally available, basic education simply because they are poor. Thus, the state must provide children who live far from school and who cannot afford private transportation with some means of access. The state's failure to do so creates a category of children who risk being totally deprived of a public education for no reason other than their parent's lack of wealth.

A. Physical Access Is An Aspect Of A Basic Public Education

Physical access to the school is an essential element of a public education. Obviously, physical access implies car or bus transportation only for those children, living beyond walking distance, whom the state cannot reasonably expect to obtain access without such transportation.

This difference between the general necessity of access and the particular need

for bus transportation is important. A major concern of the appellees and the amicus supporting appellees in the litigation below was that a court decision upholding appellant's claim would require that bus transportation be provided for all students, including students living immediately adjacent to the school. Appellee argued that this requirement would impose a large and unnecessary financial burden on the school districts.

On the contrary, only physical access to the school is an essential part of an education. Only in certain cases will busing or other state-provided means be necessary for access.

The specific circumstances in which there is a need for special provision for access will depend on both local conditions and local mores. Within the

limits of good faith judgement, the state or local government properly makes the determination of the distances which require vehicular transportation -- just as they make, in the first instance and with presumptive validity, the determination of what constitutes a basic education and of what constitutes sufficient indigency that state provided transportation is necessary.^{4/}

Car or bus transportation for those who need it is an element of a public school education in the same way that a required transcript is a part of a criminal appeal or access to a court is a

^{4/} See Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U.Pa.L.Rev.933 (1983) (the substantive requirements of equal protection are necessarily related to collective political judgments concerning the content and importance of people's needs).

part of a divorce. Griffin v. Illinois, 351 U.S. 12 (1956); Boddie v. Connecticut, 401 U.S. 371 (1971). Thus, in finding that a fee charged to those without means to pay discriminates unconstitutionally on the basis of wealth, the Court was not concerned in Griffin that a transcript is not the same as an appeal or in Boddie that court costs are not the same as a divorce.

The Court also did not object that a criminal appeal or a divorce was not guaranteed by the Constitution. It was enough that the state had generally provided for the opportunity, thus implicitly treating the opportunity as fundamental to an established constitutional right: in Griffin, the right to liberty, which cannot be deprived without due process; and in Boddie, the right to personal privacy and autonomy of

intimate associations. The state violates equal protection or due process by creating a class of people, defined in terms of wealth, which is not able to pursue a criminal appeal, file for a divorce -- or obtain a basic public education.

For constitutional purposes, the access issue in this case is similar to the access issues in Griffin and Boddie. In each case, the element for which the state charged a fee was necessary in order to obtain the underlying substantive opportunity -- the opportunity for a basic public education, an appeal, or a divorce. As the court below recognized, "[n]o one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity

offered therein." Kadrmas, supra, 402 N.W.2d at 901.^{5/}

A person's interest in obtaining a public education is the only reason he or she needs physical access to the school. This relationship, which is likewise true of the relation of a transcript to a criminal appeal and the relation of access to a court to a divorce, explains why physical access should be treated as an aspect of a basic education. It also distinguishes physical access to a public school from various necessities, such as food and clothing, which a person might

^{5/} The necessity of physical access distinguishes this case from the situation in United States v. Kras, 409 U.S. 434 (1977), where the Court found that access to bankruptcy court was not necessary for a person to compromise his or her debts. Of course, Kras is also distinguishable because of the constitutionally based importance of an education and because of the state responsibility for the location of the school and, thus, for the need for bus transportation.

need in order to obtain an education but which simultaneously serve more general needs.

In Rodriguez, this Court noted that "[b]y providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to 'guarantee . . . that all people shall have at least an adequate program of education . . .'" Rodriguez, supra, 411 U.S. at 24 (emphasis added) (citation omitted). The Court implicitly recognized that transportation (for those living at a distance), like teachers, books and operating funds, can be essential for the education. In circumstances where transportation is obviously needed, its denial can effectively deny the student a public education.

B. The State Bears Special Responsibility
For The Transportation Burden Imposed On
Children Living Far From School

The government's choice of location for its schools creates the unequal need for vehicular transportation. Obviously, school-siting decisions are an inevitable part of any public education system. Still, for those children living far from the school, the obstacle to the receipt of an education is state created. The state cannot ignore the consequences of its choice nor turn its back on a group of poor students who cannot get to school because of the state's own decisions concerning school-siting. The state's responsibility for creating the need is similar to its responsibility for creating the preconditions for access to a divorce or for obtaining a criminal appeal. Boddie,

supra; Griffin v. Illinois, 351 U.S. 12 (1956).

Thus, this case more closely resembles Boddie than United States v. Kras, 409 U.S. 434 (1973). In Boddie, the Court held that the Court could not deny access to the court proceedings necessary to obtain a divorce because of inability to pay court costs and filing fees. In Kras, the Court distinguished access to a court in order to obtain a divorce from access to court for purposes of a bankruptcy filing. The distinction was based in part on the ground that in the context of divorce "[t]he requirement that these appellants resort to the judicial process is entirely a state-created matter." Kras, supra, 409 U.S. at 442, quoting Boddie, supra, 401 U.S. at

382.^{6/} Together, Boddie and Kras suggest that when the state creates barriers to an important opportunity, the state has a higher burden to justify effective denial of the opportunity to a category of people defined by wealth.

The government's choice of location of schools inevitably creates substantial, and in some cases insurmountable, burdens for children living far away. Historically, North Dakota has itself recognized its responsibility for this unequally imposed burden.

As early as 1890, North Dakota required each township to provide a new school whenever petitioned by parents of

^{6/} The Court in Kras emphasized that there were other means to settle one's debts that would theoretically be available to the indigent, but that the state had given itself exclusive control over the means to obtain a divorce. 409 U.S. at 445-46.

twelve or more school-age children who lived more than two miles from an existing school. Chap. 62, Section 83, 1890 Laws of North Dakota. In 1907, North Dakota provided that the school districts "shall provide transportation. . . to and from school" for children residing more than three miles away. Kademas, supra, 402 N.W.2d at 900 (quoting 1907 legislation).^{7/} State participation in providing transportation or compensation for transportation has been continuous since that date. Id. Furthermore, until 1971, the state's

^{7/} According to a government study, "in almost all states responsibility for providing transportation rests with the local school districts. This responsibility may be either mandatory or discretionary...[and] states usually reimburse school districts for the cost of transporting students." State Legal Standards For the Provision of Public Education: An Overview 73 (Dept. of Health, Education and Welfare, 1978). The Overview lists statutory and regulatory provisions for each state, id. at 74-77.

compulsory attendance law exempted parents from the compulsory duty of sending their children to school when the state had not provided a school within two miles of their home, id., thereby implicitly recognizing that the responsibility for the child's absence lay in the state's failure to provide a closer school. Not until 1979 did the legislature first enact Section 15-34.2-06.1, N.D.C.C., authorizing nonreorganized school districts to charge a fee for schoolbus service. Id. at 899. Even today, North Dakota requires reorganized school districts, which constitute most of the districts within the state, to provide bus transportation, or other governmentally provided means of access, for those living far from school. Section 15-27.3-10, N.D.C.C.

State responsibility for physical access to a public education also exists because of the nature of interest at stake. At least when the state generally provides for public education, the child's interest is in the affirmative provision of the education -- an interest not to be denied what others are receiving. Plyler. This Court has repeatedly emphasized that the opportunity to receive an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Education, 347 U.S. at 493, quoted in Rodriguez, supra, 411 U.S. at 30, and in Plyler, supra, 457 U.S. at 233.

This case is therefore distinguishable from the state's failure to provide for effective use of rights such as those at issue in Harris v. McRae, 448 U.S. 297, 316

(1980). There, a majority of the Court upheld the government's exclusion of medically necessary abortions from Medicaid coverage. The Court concluded that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." Harris, supra, 448 U.S. at 316 (1980).^{8/} In contrast, the government's choice of location of its schools places an obstacle -- or, at least, a distance -- in the path of those students living far from the schoolhouse.

^{8/} The Court in Harris then argued that indigency is not a government-created obstacle, 448 U.S. at 316, but indigency combined with the government-created need for the money, which is the situation here as it was in Boddie and Tate v. Short, 401 U.S. 395 (1971), is a governmentally created obstacle.

Equally important is the distinction between the character of the underlying constitutional concern. Under Roe v. Wade, 410 U.S. 113 (1973), for example, this Court only recognized a negative state duty -- the state must generally refrain from interfering with a woman's right to choose childbirth or abortion, at least during the first two trimesters of pregnancy. In contrast, a child's interest in an education is an interest in affirmatively receiving the basic education that the state generally provides. It is the affirmative character of this concern that makes the provision of education "perhaps the most important function of state and local governments." Brown, supra, 347 U.S. at 493.

Thus, physical access to an education has three crucial similarities to other

opportunities, such as a criminal appeal or access to a court for a divorce, that this Court has found cannot be denied on the basis of poverty. First, the state has itself created the need for the transportation, the access to court, or the transcript. Second, in each case, fulfilling the need is a prerequisite for something that the state has treated as fundamental. Third, the transportation, like the access to the court or the transcript, is needed only for this purpose, a factor that conceptually ties it to the underlying fundamental interest and limits the scope of the claims based on that interest.

C. The State Cannot Deny A Basic Education On Grounds of Wealth

In Rodriguez, the Court recognized the possibility that some amount of education might be implicitly required by the

Constitution as a prerequisite to a meaningful exercise of either freedom of speech or the right to vote, but found that there "was no indication that the present levels of educational expenditure in Texas provide an education that falls short." 411 U.S. at 36-37. The Court emphasized that "no charge could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process." Id. at 37.

Thus, the Court in Rodriguez did not determine the merits of a complaint that "a State's financing system occasioned an absolute denial of educational opportunities to any of its children." Id. at 37. It speculated, however, that "a far more compelling set of circumstances for judi-

cial assistance than the [circumstances in Rodriguez]" would be presented by an education system that made "elementary and secondary education . . . available . . . only to those able to pay a tuition . . . , [because] there would be a clearly defined class of 'poor' people -- definable in terms of their inability to pay the prescribed sum -- who would be absolutely precluded from receiving an education." Id. at 25 n.60.^{9/}

^{9/} Challenges to school fees have been common under state constitutions. Although the results vary, see Dellinger, The Unresolved Status of Public School Fees, 9 School Law Bulletin 1 (April, 1978), one collection of cases noted that the challenged school fees are invalidated twice as often as they are upheld. Annotation: Validity of Exaction of Fees From Children Attending Elementary or Secondary Public Schools, 41 ALR3d 752. Fees typically upheld by state courts are those that are waived on grounds of poverty or that are charged only for activities, such as recreation, that are not considered essential to a basic education. Here, the school bus service is essential and no waiver program exists.

Precisely the situation hypothesized in Rodriguez was presented in Plyler^{10/} and is presented here, except that the fees are only assessed against a subgroup of students.

Of course, tuition is not precisely the same as a busing charge. However, for a child who cannot walk or bicycle to school and who has no other private means of transportation, the fees create identical barriers: inability to pay can

^{10/} The Texas statute challenged in Plyler apparently authorized complete denial of education to children who were not legally admitted into the country, but the school district allowed enrollment if the child paid a "full tuition fee." 457 U.S. at 205 n1. The majority generally refers to this as a "denial of a free public education," see id. at 205, while the dissent more often characterizes the issue as the permissibility of charging a "tuition" to illegal aliens. Id. at 249.

result in a total denial of a public education.^{11/}

The Court in Plyler required the state to demonstrate that its system of discriminatory access to public education served some "substantial goal of the State." 457 U.S. at 224. Certainly, there is no acceptable justification for depriving children in this case of a public education. See Point III. Although the court below concluded "that the charges authorized by Section 15-34.2-06.1, N.D.C.C., are rationally related to the legitimate governmental objective of

^{11/} Another difference is that the annual \$97 bus fare challenged in this case is presumably less than the \$1000 tuition challenged in Plyler, -- although it is more than the average of \$60 in filing fees and court costs required for a divorce, which were invalidated for those without means to pay in Boddie. The amount of the fee should affect only the level of poverty for which waiver is required, not the constitutional need for a waiver program.

allocating limited resources . . . ,"
Kadrmas, supra, 402 N.W.2d at 903, the majority in Plyler indicated that "a concern for the preservation of resources alone can hardly justify the classification used in allocating those resources," 457 U.S. at 227 (citation omitted), and the dissent agreed, stating that "fiscal concerns alone could not justify . . . an arbitrary and irrational denial of benefits to a particular group of persons." Id. at 249.

The only difference between the category of children discriminated against in this case and in Plyler, is that in Plyler the state assessed the fees against illegal aliens and here it assessed the fees against the impoverished, rural North Dakota child who lives far from the nearest school. If relevant at all, this differ-

ence makes the denial of equal protection in this case even more evident.^{12/}

The dissent in Plyler would also suggest the propriety of relief here. It argued that "[t]he dispositive issue . . . is whether . . . a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there." 457 U.S. at 243-44. The dissent then concluded that "it simply is not 'irrational' for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state

^{12/} There is a systematic danger that the political process will not respond to the needs of a small group of children requiring busing. Although seeing itself bound by a provision in its Constitution, a Michigan Court of Appeals feared that denial of free school bus service may "fall disproportionately upon a minority of rural families who are politically powerless to alter the situation." Lintz v. Bd. Education, 325 N.W.2d 803, 806 (1982).

and this country is illegal as it does to provide for persons lawfully present." Id. at 250.

In this case, it is "irrational" for the state to deny that it has "the same responsibility" for the education of those children, "lawfully present," who live far from the schoolhouse as it does to educate those who live nearby. The failure to provide free transportation, when required, is inconsistent with this "responsibility" and is unconstitutional in the absence of a substantial governmental interest requiring denial.^{13/}

^{13/} Inability to pay the state imposed busing fee can result in a parent being guilty of a criminal violation, as well as the child being deprived of an education. Throughout its history, North Dakota has had various compulsory attendance laws. See 402 N.W. 2d at 900. In 1971, the Legislature for the first time omitted distance as a basis for exemption from the compulsory attendance requirement. 1971 N.D. Sess. Laws, Ch. 158, §5. (cited in Kadmas, supra, 402 N.W. 2d at (continued...)

II. THE STATE CANNOT CONDITION ACCESS TO A
GENERALLY PROVIDED BASIC PUBLIC
EDUCATION ON THE PAYMENT OF A FEE

In addition to the unconstitutionality of wealth discrimination resulting in a complete denial of a basic public education, this Court's precedents indicate that any fee charged for an opportunity that "has a fundamental role in maintaining

13/ (...continued)
900). That omission, combined with the requirement in the Dickinson School District that a parent residing beyond four miles from a school either provide or pay for transportation in order to avoid a law violation, see Section 15-34.1-01 and 15-34.1-05 N.D.C.C., makes the situation analogous to the unconstitutional sentence of "so many days or so many dollars." Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); see also, Bearden v. Georgia, 461 U.S. 660 (1983) (inability to pay fine is impermissible reason to revoke parole). Both here and in Tate, the state is responsible for creating a situation in which a person can be made subject to criminal punishment solely because of inability to make a payment to the state. Even worse, unlike in Tate, the need to make the transportation payment results not from any objectionable behavior of the parent but from the state's choice of the school's location.

the fabric of our society," Plyler, supra, 457 U.S. at 221, may be unconstitutional. The state has an obligation to make certain opportunities available without charge if it makes them available at all.

Even though the right to vote is not itself explicitly guaranteed by the Constitution, "once the franchise is granted to the electorate," Harper v. Virginia State Board of Elections, 383 U.S. 663, 665 (1966), "a State violates Equal Protection . . . whenever it makes . . . payment of any fee an electoral standard." Id. 666. Thus, in Harper, the Court did not ask whether the plaintiffs would be able to pay \$1.50. The imposition of the fee was itself unconstitutional.

Likewise, in Plyler, this Court invalidated a tuition fee. It held that a state cannot "deny a discrete group of

innocent children the free public education that it offers to other children residing within its borders . . .[unless] justified by a showing that it furthers some substantial state interest." Plyler, supra, 457 U.S. at 230. The analogue with the right to vote is clear: "[denial of an education] relegates the individual to second-class social status; [denial of the vote] places him at a permanent political disadvantage." 457 U.S. at 234 (Blackmun, J., concurring).

The district court in Plyler noted that some undocumented children paid tuition to attend school. Doe v. Plyer, 458 F.Supp. 569, 575 (1978). Nevertheless, this Court did not merely require a waiver for those unable to pay. Rather, in the context involved in Plyler, the Court held

that the school district could not charge for the right to receive an education.

Thus, the decision in Plyler suggests that there is no substantial state interest promoted by imposing any fee that restricts access to a basic education. If "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process[.]" Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966) (invalidating a \$1.50 poll tax), wealth also should not be germane to one's need for an education.^{14/}

^{14/} Although wealth is not relevant to the need for an education, education might be relevant to one's intelligent participation in the electoral process, suggesting another analogy between the objections to the fee here and in Harper. See Lassiter v. Northampton County Board of Elections, 369 U.S. 45 (1959); Rodriguez, 411 U.S. at 35-36; but see Oregon v. Mitchell, 400 U.S. 112 (1970) (unanimously upholding a nationwide suspension of literacy tests).

Acting after this Court's decision in Rodriguez, Congress also concluded that equal protection required the state to provide a free public education. In 1975, Congress adopted a law to assure handicapped children "a free appropriate public education," Education For All Handicapped Children Act of 1975, Pub. Law 94-142, Sec. 3(c), which Congress found must include needed "transportation." Id. at Sec. 4(a)(4), 20 U.S.C. Sec. 1401 (17) and (18). Both the statutory language, which stated that the Act was passed "in order to assure equal protection of the law," id. at Sec. 3(b)(9), and the legislative history indicates Congress' view that a free public education,

including provision of transportation, is constitutionally required.^{15/}

The Court in Plyler implicitly placed a basic public education in the same status as the right to vote -- once the state has decided to rely upon the franchise or generally provide for a public education. These two rights have crucial elements in

^{15/} Congress accepted the view of a lower court that: "the Constitution of the United States. . . [requires the defendants] to provide a publicly-supported education for these 'exceptional' children. . . . If sufficient funds are not available. . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education. . . ." S. Rep. No. 94-168, 94th Congress, 1st Sess., 23, reprinted in U.S. Code Cong. & Admin. News 1975, 1447 (emphasis deleted) (quoting Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972)). See also, Board of Education v. Rowley, 458 U.S. 176, 200 (1982) (since Congress was acting after Rodriguez, Congress could have only properly interpreted equal protection to require a "basic floor of opportunity"). Congress is undoubtedly correct that this constitutional standard does not permit the state to fail to provide free physical access to the school -- which, in this case, means free bus transportation.

common that distinguish them from rights for which the constitution only requires a waiver for indigency.

The most important common element is that people availing themselves of both of these opportunities materially advance the strength and well being of our democratic society. Society has an interest in the universal use of these opportunities. Thus, it has no interest in restricting these opportunities out of a concern that universal participation would waste resources.

In contrast, often the state charges a fee or allows a private actor to charge a fee because the activity "uses resources in a manner that could be wasteful. Although society benefits by the existence of these rights, it may benefit from all exercise of the right to the extent that the actors do

not consider the use of resources involved. Even if the activity is constitutionally protected or "fundamental, the individual's desire to engage in the activity may be slight compared to the amount of resources consumed. In these situations, too much use could be wasteful. The state, however, cannot properly desire to ration the exercise of the vote or the receipt of a basic education.^{16/} Any deterrence that a fee would create is contrary to the reason that the opportunity is provided.

This Court, Congress, and the states have recognized that both education and the vote are rights from which our society benefits as the rights are exercised by

^{16/} Virtually universal compulsory attendance laws illustrate in the strongest possible way that the states recognize that they have no interest in rationing the receipt of a basic public education.

more and more people. Society can have no substantial or even legitimate interest in burdening their exercise. Thus, in Harper, the Court made clear that a violation occurs not merely when the system excludes "those unable to pay a fee to vote" but also when it excludes those "who fail to pay." 383 U.S. at 668. The same is true for a basic public education.

III. DENIAL OF FREE TRANSPORTATION TO CHILDREN IN NONREORGANIZED DISTRICTS IS IRRATIONAL AND INVIDIOUS

A. Geographical Discrimination That Could Result In A Complete Deprivation Of Education Should Be Subject To Heightened Review

North Dakota denies equal protection of the laws to residents of nonreorganized school districts, including plaintiffs here, by withholding from them the provision of free bus transportation that

it guarantees to residents of reorganized school districts. See Section 15-27.3-10, N.D.C.C. (reorganized districts required to provide transportation); Section 15-34.2-06.1, N.D.C.C. (school districts that have not reorganized can charge for school bus service). Kadrmas, supra, 402 N.W.2d at 903.

Geographical discriminations are subject to normal equal protection scrutiny, with the level varying depending on the nature of the right involved. See, e.g., Parker v. Levy, 411 U.S. 978 (1973), aff'g 346 F. Supp. 897 (E.D. La. 1972) (invalidating as irrational Louisiana's scheme for distribution of tax relief to parishes); Rodriguez, supra, 411 U.S. at 54-55 (applying rational basis test to geographical variations); Evans v. Cornman, 398 U.S. 419 (1970) (invalidating voter

residency law that disqualified persons who lived on a federal enclave from voting in the state); Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating geographical discrimination respecting the number of voters required to elect representative).^{17/}

Most recently, in Papasan v. Allen, 106 S.Ct. 2932 (1986), the Court held that the state's inequality among counties in the per pupil disbursement of funds derived from public school lands raised an equal protection issue.

^{17/} A contrary line of authority, see Missouri v. Lewis, 101 U.S. 22 (1880) (upholding law that routed most appeals from some counties first to the St. Louis Court of Appeals and from other counties directly to the state supreme court) originated at a time when equal protection was thought to apply to little other than race. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). As the cases in the text indicate, this contrary line of authority, which is discussed and criticized in Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 U.Pa.L.Rev. 261 (1987), can hardly be accepted as describing current doctrine.

Because the petitioners in Papasan had not alleged (and apparently could not allege) any facts suggesting that this geographical discrimination deprived them of a minimally adequate education, the Court found that Rodriguez dictated the standard of review. This Court found that the lower court had improperly dismissed the complaint but said that disparities between disbursements for Mississippi's school districts were to be upheld unless "not rationally related to a legitimate state interest." Papasan, supra, 106 S.Ct. at 2945. Therefore, North Dakota's geographical discrimination must at least be shown to serve a rational, non-invidious, legitimate state purpose.

Moreover, the possibility of a complete denial of a public education for children of indigent families who live in

the districts discriminated against requires application of a heightened standard of review. "As Rodriguez and Plyler indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Papasan, supra, 106 S.Ct. at 2944. But in the context of an absolute deprivation, the Court in Plyler held that the law could not be upheld "unless it furthers some substantial goal of the State," Plyler, supra, 457 U.S. at 224, which is the standard the Court had earlier identified as "intermediate scrutiny." Id. at 218 n16.

Since denial of necessary transportation to children of indigent

parents can cause an absolute deprivation of a public school education, North Dakota's decision to deny this transportation to children in nonreorganized districts should be upheld only if it furthers a substantial state interest.

B. The Discrimination Between Districts Serves No Substantial Or Even Rational, Legitimate State Purpose

The discrimination between districts does not even survive a lower standard of review. From the perspective of the children's interest and need for an education or from the perspective of any other legitimate state interest, the children in reorganized and nonreorganized districts are similarly situated. Requiring only reorganized school districts to provide free transportation invidiously sacrifices the educational interests of those children in nonreorganized districts

who require vehicular transportation. This discrimination sacrifices these children's equal interest in receiving a free public education. And for those from impoverished homes, the discrimination could operate completely to deny them a public education.

This discrimination between districts serves no substantial or legitimate state purpose. First, allowing some districts to charge a fee does not directly advance any state interest in securing all children within the state a minimally adequate education. Certainly, the need of the children for free busing is the same in both types of districts.

Second, the distinction that allows only nonreorganized districts to choose whether or not to charge cannot be said to serve any state interest in local control - particularly given that the state favors

the reorganization of districts, Kadmas, supra, 402 N.W.2d at 903, while it is precisely these reorganized districts that North Dakota deprives of discretion in determining whether or not to charge for busing. Thus, the state does not and could not claim that the discrimination between the districts serves this interest in local control that was found to be so important in Rodriguez.

Third, the distinctions between the two types of districts is not even the result of local autonomous choices concerning busing. Rather, North Dakota itself is directly responsible for the different status of the school districts, giving choice to some but denying choice to others.^{18/} The Court in Papasan said that

^{18/} See Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 (continued...)

it was precisely this state responsibility that potentially could discredit the rationality of Mississippi's allocation of revenue from school lands as compared to the local responsibility for the financing decisions challenged in Rodriguez. Papasan, supra, 106 S.Ct. at 2946.

C. The One Purported State Purpose Is Neither Substantial Nor Legitimate But Rather Is Impermissibly Invidious

The North Dakota Supreme Court found that discrimination did have a purpose. It explained that "[t]he obvious purpose of

18/ (...continued)

U.Pa.L.Rev. 261 (1987). The legislation challenged in this case resembles "special legislation," which "does not constitute an ongoing process of self-determination by the affected population," id. at 335. In contrast, state-wide local option laws promote local self-determination but do not involve the state imposing the lack of uniformity. Thus, "local option laws are more consistent with equal protection principles than special laws are" -- although even special legislation involving non-fundamental interests may often be found to be rational. Id. at 336.

[legislation only imposing a requirement of free transportation on reorganized districts] is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system." Kadrmas, supra, 402 N.W.2d at 903.

However important the goal of reorganizing school districts, the challenged discrimination is not a legitimate nor rational way, and certainly not the only way, for North Dakota to encourage reorganization. Nothing in the record, the North Dakota Supreme Court's opinion, nor common sense suggests that this discrimination is actually an effective means to encourage reorganization. For parents of children who do not require transportation, for example, for parents of 87 percent of the students in the Dickinson

School District, Kadrmas, 402 N.W.2d at 898, as well as for those voters without children, the requirement that reorganized districts provide free transportation would provide no obvious encouragement to vote for reorganization.

The requirement that reorganized districts provide free transportation might actually deter reorganization out of fear that the added cost of busing would increase tax bills or reduce expenditures on other aspects of education - even though as a practical matter, this fear would be unreasonable given the minimal amount that free busing costs the school district.^{19/}

^{19/} The state pays a large portion of the costs of school busing and, under current law, the nonreorganized district is only permitted to charge a maximum of the difference between the actual costs and the amount it receives from the state. Section 15-34.2-06.1, N.D.C.C. Of total transportation expenses of the \$312,147 in the 1984-85 school year, the Dickinson Public School
(continued...)

Thus, rather than serving the asserted state purpose, this discrimination could operate to undermine this purpose.

Nevertheless, reorganization is not the immediate purpose served by the challenged discrimination. Rather, the identified purpose is to "encourage" reorganization, presumably by affecting the voting and political actions of some people within the district. Kadrmas, supra, 402 N.W.2d at 903. However, what the state describes as "encouragement" is in effect a penalty assessed less on recalcitrant voters than on innocent children. Moreover, as opposed to reorganization, which the state could more easily and more

^{19/} (...continued)
District could have charged parents a maximum of \$68,000 in fees. It actually charged only about \$34,000. Still, these fees can impose great hardship to many poor families and potentially can cause a complete deprivation for indigent families.

certainly achieve by other means, including by directly mandating reorganization, this "encouragement" is hardly a substantial state interest.

The state's means are not only irrational, they are also invidious. The state intends the guarantee of free transportation to "provide[] incentive for people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district." Kadrmas, supra, 402 N.W.2d at 903.

Of course, the concern for the cost of student transportation exists in both types of districts. The state decision in 1978 to authorize nonreorganized districts to charge for busing is a calculated sacrifice of the interests of those children who

require vehicular transportation and live in nonreorganized districts.

This sacrifice of the legitimate interests of a subgroup of children in the hope of affecting the actions of various adults fails to correspond to the "sovereign's duty to govern impartially." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring). After noting "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing," this Court concluded that "penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Likewise, here, penalizing the rural child in the nonreorganized district is an "unjust []

way of deterring the parent" from voting against reorganization. Here, as in Weber, there is no "characteristic of the disadvantaged class that justifies the disparate treatment." Cleburne, supra, 473 U.S. at 453 (Stevens, J., concurring).

The state's claim in this case would be analogous to a claim in Plyler that the denial of an education, with its contribution to a creation of a permanent underclass, served the "substantial" purpose of pressuring the United States government or the citizens of Texas to do something about the problem of illegal aliens.

It is also as if the state in Cleburne justified its discrimination as a means of encouraging a political response to the housing needs of the mentally retarded. Of course, inducement of a political response

might be the consequence of a program justified on legitimate grounds; but for this to be the purpose of the law is to invidiously sacrifice the interests of those harmed by the discrimination.

Thus, North Dakota's invidious discrimination against children in nonreorganized districts violates the basic premise of equal protection that "all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). It should, therefore, be struck down by this Court.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the North Dakota Supreme Court and hold that the law

permitting nonreorganized school districts
to charge students, including children of
indigent families, a fee for necessary
school bus service violates the equal
protection clause of the Fourteenth
Amendment.

Respectfully submitted,

C. EDWIN BAKER
(Counsel of Record)
JOHN A. POWELL
HELEN HERSHKOFF
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

ROBERT VOGEL
North Dakota Chapter of the
American Civil Liberties Union
Foundation
P. O. Box 1376
Grand Forks, ND 58206-1376
(701) 775-3117

Dated: December 3, 1987

AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

PAULA KADRMAS and SARITA KADRMAS,
a minor by her next friend, Paula Kadrmas,
Appellants,
vs.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in his capacity
as Superintendent of the Dickinson Public Schools;
CLARENCE STORSETH, NANCY JOHNSON, MERRY JOHNSTON,
HAROLD KREIG, HERB HERAUF, in their capacity as mem-
bers of the Dickinson School Board; RICHARD RYKOWSKY,
in his capacity as Transportation Supervisor of the
Dickinson Public Schools,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

**BRIEF AMICI CURIAE OF THE CHILDREN'S
DEFENSE FUND, THE FARMERS LEGAL ACTION
GROUP, AND PRAIRIEFIRE RURAL ACTION, INC.**

JULIUS L. CHAMBERS
JOHN CHARLES BOGER*
JAMES P. STEYER
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

Attorneys for Amici Curiae

*Counsel of Record

39120

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF <u>AMICI CURIAE</u>	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT	11
I. Impoverished Families Like the Kadrmas Are Forced To Make Impossible Choices Regarding The Needs if Their Children ...	11
A. An Explanation of How Poverty Is Measured ...	13
B. The Rate of Poverty Has Increased Signi- ficantly in the Past Decade, Particularly Among Children	15
C. Increasingly, Rural Families Have Fallen Into Poverty	19
D. Poverty Demands Extra- ordinary Sacrifices From Families Like the Kadrmas	23
E. Poor Families Like the Kadrmas Lack Finan- cial Flexibility	30

F. Conclusion	32
---------------------	----

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
Brown v. Board of Education, 347 U.S. 483 (1954)	34
Coleman v. Lyng, 663 F.Supp. 1315 (D.N.D. 1987)	4
Plyler v. Doe, 457 U.S. 202 (1982)	29
<u>Other Authorities</u>	
D. Caplovitz, <u>The Poor Pay More</u> (1967)	30,31
<u>Census and Designation of Poverty and Income: Joint Hearing Before the Subcomm. on Census and Popu- lation of the Comm. on Post Office and Civil Service, and the Subcomm. on Oversight of the Comm. on Ways and Means, House of Representatives, 98th Cong., 2nd Sess. (1984)</u>	13,14
Center on Budget and Policy Priorities, <u>Gap Between Rich and Poor Widest Ever Recorded.</u> (1987)	19
Center on Budget and Policy Priorities, <u>Smaller Slices of</u>	

<u>the Pie. (1985)</u>	16,18
Children's Defense Fund, <u>A Children's Defense Budget: FY 1988 An Analysis of Our Nations Investment in Children</u> (1987)	26,28
Physicians Task Force on Hunger, <u>Physician Task Force on Hunger in America. 1985</u>	25
R. Plotnick and F.S. Kidmore, <u>Progress Against Poverty: A Review of the 1964-1974 Decade</u> (1975)	14
U.S. Department of Commerce, Bureau of the Census, <u>Money Income of Households, Families and Persons in the United States</u> (Series P. 60) 1984, 1986, 1987	passim

IN THE
UNITED STATES SUPREME COURT
October Term, 1987

PAULA KADRMAS and SARITA KADRMAS,
a minor by her next friend, Paula
Kadrmass,

Appellants,

vs.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON,
in his capacity as Superintendent of the
Dickinson Public Schools; CLARENCE
STORSETH, NANCY JOHNSON, MERRY JOHNSTON,
HAROLD KREIG, HERB HERAUF, in their
capacity as members of the Dickinson
School Board; RICHARD RYKOWSKY, in his
capacity as Transportation Supervisor
of the Dickinson Public Schools,

Appellees.

=====

On Appeal From The Supreme
Court of North Dakota

=====

BRIEF FOR AMICI CURIAE

The Children's Defense Fund, the
Farmers Legal Action Group, and Prairie
Fire Rural Action, Inc. respectfully
submit this brief as amici curiae, upon

consent of the parties, pursuant to Rule 36.2 of the Rules of the Court.

STATEMENT OF INTEREST OF AMICI CURIAE

The Children's Defense Fund (CDF) is a national public charity that for nearly 20 years has served as an advocate for America's children and their families, especially poor, minority and handicapped children. CDF's goal is to educate the nation about the needs of poor children and to encourage preventive investments which will promote their full and healthy development. CDF's work spans a broad range of public policy issues, including family income, education, health care, child care and other services essential to the well-being of the next generation and to the future of the nation. CDF works for policies which will ensure that children from low-income families develop sound academic skills through effective

preschool, elementary and secondary school programs.

Farmers' Legal Action Group (FLAG) is a nonprofit corporation organized to provide legal education, assistance and support to financially distressed family farmers and their attorneys. In the course of their work, FLAG staff attorneys and legal assistants have provided lectures, workshop presentations, seminars and consultation on rural poverty issues in more than 30 states. FLAG's staff meets with and explains legal rights and responsibilities affecting farmers in financial distress. FLAG also publishes a monthly newsletter that is circulated nationally and has published numerous educational books and materials.

In addition, Farmers' Legal Action Group represents farmers in numerous

class action lawsuits which seek to enforce federal statutes and regulations. In one case, Coleman v. Lyng, 663 F. Supp. 1315 (D.N.D. 1987), FLAG attorneys represent all 250,000-plus borrowers from Farmers Home Administration throughout the country. FLAG seeks the permission of this Court to appear as amicus curiae on behalf of the farmers and ranchers it represents in the Coleman v. Lyng litigation.

Prairiefire Rural Action, Inc. is an independent, non-profit, education, research and community action organization based in Des Moines, Iowa. Since 1982, it has been actively involved in developing a regional and national grassroots response to the economic and social crisis in American agriculture and rural life.

The organization's principal objectives include keeping small and medium-size family farms in operation and farm families on the land; revitalizing family farm agriculture in the U.S.; and building strong coalitions in support of family farm agriculture.

Prairiefire has worked directly with farm and rural families adversely affected by the current economic crisis and has engaged in public policy research and legal advocacy. Increasingly, Prairiefire staff have been called upon to educate and train the leaders and staff of farm, rural and religious organizations responding to the crisis in their respective states and regions.

SUMMARY OF ARGUMENT

This is a case grounded in the realities of poverty and what it means to be poor in America today.

Beneath the arguments about the proper scope of the equal protection clause lies the dilemma of a poor, working-class family forced to make untenable choices concerning the health and well-being of their children. It is not just a case about mandatory school busing fees imposed upon a small percentage of North Dakota school children, who are penalized for living in non-reorganized school districts. It is also a case about blue collar families trapped in the grip of poverty, and a state financing scheme which unconstitutionally fails to take account of their plight.

To assist the Court in evaluating this case, amici hope to place the matter in its proper context. This case is

played out at the "poverty line,"¹ below which 32.4 million Americans currently manage to survive. For a family at 100 percent of the poverty line - which permits approximately 85 cents a meal per household member - \$97 in school bus fees can pose a major financial dilemma.

The case involves a working poor family, one of more than two millions in America like the Kadrmases with one or more members employed fulltime in the workforce who still live at or below the margins of poverty. Including

¹ For a family of four, the official poverty threshold in 1986 was \$11,203 a year. This standard is based on the United States Department of Agriculture's measure of the cost of a temporary, low-budget diet, which by 1986 figures amount to approximately \$2.55 per person per day in a family of four. This figure is then multiplied by a factor of three to reflect the assumption that food typically represents one-third of the total expenses of a low-income family, an assumption many feel is significantly outdated.

dependents, these families represent 6.4 million people, or 19 percent of the poor.² Working poor families have become commonplace in rural, farm-belt states such as North Dakota, where the energy and agricultural sectors have been buffeted by the economic downswings of the past decade. For many Midwestern families like the Kadrmases, poverty has become the dominant fact of life in the 1980s.

Coping with poverty has forced parents like Paula Kadrmas to make trade-offs in their children's lives that would be inconceivable to most Americans. There is simply not enough money for all the basic necessities of life, let alone any luxuries. Young children like Sarita

² United States Department of Commerce, Bureau of the Census, Money Income of Households, Families and Persons in the United States 33 (1984, Apr. 1986) (Series P. 60 No. 151).

Kadrmas need adequate food and nutrition; they need clothes; they need decent shelter; they need adequate health care; and, of course, they need access to a decent education, which represents their best hope for lifting themselves out of poverty.

Yet each of these bare essentials exacts a monetary cost. When added together, the sum total of such necessities can overwhelm a family living at the margin of poverty (not to mention 40 percent of indigent households with incomes which are less than half the official poverty standard).³ For such families, \$97 a year for school bus fees represents food out of a child's mouth, clothing off her back, or heat turned down low in the bone-chilling winters of

³ United States Census Bureau, 1987 poverty data.

North Dakota. North Dakota's mandatory bus fee, in short, can force poor families like the Kadrmas to make bitter choices between the State's educational demands and their child's need for food, health care, and adequate shelter.

The statutes under challenge in the case are arbitrary and irrational. They exact no bus fees at all from 85% of North Dakota's families -- whether rich or poor -- who happen to live in reorganized school districts. At the same time, they allow mandatory bus fees in districts that have not reorganized, without providing any waiver at all, even for the most desperately poor of families. These statutes thus cast the heaviest financial burden on an arbitrary minority of North Dakota families like the Kadrmas, who are poor

and whose voice cannot be heard in the political process. By so burdening the right of these indigent children to education, these statutes violate the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

IMPOVERISHED FAMILIES LIKE THE KADRMASES ARE FORCED TO MAKE IMPOSSIBLE CHOICES REGARDING THE NEEDS OF THEIR CHILDREN

To those like the Kadrmas who are poor, poverty is neither a statistical nor a sociological matter. Their condition demands a daily struggle for survival. The deprivation they confront is real, not a trick of rhetoric or statistical analysis. Thus any consideration of the constitutionality of a \$97 bus fee must begin by reflecting both upon the definition of poverty and upon what that definition means in human terms.

The Kadrmas family consists of the appellants, Paula and Sarita, Paula's husband and two pre-school children. Mr. Kadrmas was intermittently employed as a motorman for an oil drilling company at the time of this action. The trial court found that the Kadrmas family had a gross (pre-tax) income at or near the federal poverty level for a family of five. The Kadrmases received no federal housing subsidies, no Medicaid, and no Food Stamps. Paula Kadrmas indicated that she and her husband offered shelter and food to several of her relatives for five months during the year of the trial, making a total of up to nine persons living off an income which barely met the federal poverty line for a family of five.⁴

⁴ Former co-plaintiff, Marcia Hall (who is not an appellant in this Court because she has moved out of North

A. An Explanation of How Poverty Is Measured

The poverty "line" was initially established by taking the cost of what the United States Department of Agriculture in 1959 called the "economy food plan" (itself a lower-cost diet than the Agriculture Department's definition of a "minimum standard diet") and multiplying it by three.⁵ A few years

Dakota) had an income substantially below the federal poverty standard for a family of three. Ms. Hall held two jobs in an attempt to support her two young children; she received no government benefits other than some Food Stamps.

⁵ Census and Designation of Poverty and Income: Joint Hearing Before the Subcomm. on Census and Population of the Comm. on Post Office and Civil Service, and the Subcomm. on Oversight of the Comm. on Ways and Means, House of Representatives, 98th Cong., 2nd Sess. pp. 8, 11, 14 (1984) [hereinafter Joint Hearing on Poverty and Income] (testimony of Mollie Orshansky). The factor of 3 was based on surveys by the Bureau of Census done in 1955 which showed that the "economy food plan" would cost approximately one-third of the median household budget for a family of three.

later the number was indexed to annual changes in the rate of inflation instead of to annual recalculation of the cost of the economy food plan.⁶ The level of income necessary to escape poverty was thus deliberately understated at the

Ms. Orshansky testified that "in choosing the lowest food plan that the Agriculture Department had, ... as in choosing the so-called multiplier that I did and that I got approved, I thought ... that it was better to maybe understate the need." Id., at 11. (Emphasis added). See Plotnick & Skidmore, Progress Against Poverty, 32-33 (1975).

⁶ Joint Hearing on Poverty and Income (testimony of Mollie Orshansky), supra, at 15. The indexing of the poverty rate to the Consumer Price Index was a compromise made in 1969. At that time, Ms. Orshansky and the head of her group in the Social Security Administration, Mrs. Marion, decided that the poverty line should be raised to compensate for changes in food budget patterns reflected in a 1965 survey conducted by the Census Bureau. They first asked the permission of the Office of Management and Budget and the Council of Economic Advisers and were told, "You can't change it [the poverty line]; it is no longer yours." The indexing was a compromise.

start;⁷ thereafter that understatement was locked in by indexation.⁸

Working families like the Kadrmases, who receive virtually no government benefits, thus bear the full brunt of poverty's impact.

B. The Rate of Poverty Has Increased Significantly in the Past Decade, Particularly Among Children

From 1959, when this nation began keeping poverty statistics, the percentage of Americans who were poor dropped rather steadily until 1973, from

⁷ See note 4, supra.

⁸ Even if the original poverty line in 1959 was realistic, its counterpart today is, if anything, too low, since shelter, home heating and health care costs to the poor have increased at rates exceeding the rate of inflation. Center on Budget and Policy Priorities, Smaller Slice of The Pie, 16 (1985); Joint Hearing On Poverty and Income (testimony of Mollie Orshansky), at 14.

22.4 percent to 11.1 percent.⁹ Over the next five years, changes were mainly cyclical, reflecting the severe recession of 1974-75, but ending with a 1978 poverty rate of 11.4 percent.¹⁰ After 1978, however, the rate of Americans living in poverty began a steady upward trend, peaking at 15.3 percent in 1983. While the national rate has declined slightly since 1984, poverty figures in the rural Midwest have remained high. Even the national total of 32.4 million impoverished citizens in 1986 represents nearly 8 million more poor Americans than

⁹ Bureau of the Census, United States Department of Commerce, Money Income and Poverty Status of Families and Persons in the United States: 1986, 21 (Series P.-60, No. 178 July 1987)

¹⁰ Id.

in 1978, and more than nine million more than in 1973 (a 40% increase).¹¹

Equally significant, a major shift has occurred in the composition of the poor. With the indexing of Social Security and the enactment of the Supplemental Security Income program (SSI), poverty has decreased among the elderly. At the same time, however, it has sharply increased for American children like Sarita Kadrmas. Among families with children, especially single-parent families like Marsha Hall and her two youngsters, poverty has soared to epidemic proportions in the 1980s. More than one out of every five American children is now poor.¹²

¹¹ Id.

¹² Id. as revised by the Bureau of the Census in 1987. In North Dakota, the latest figures reveal that nearly one out of five children (18.2%) live in poverty today.

Census figures reveal another disturbing trend about American poverty in the 1980s: the poor are becoming poorer, not just more numerous.¹³

Over- all, the average poor family in 1986 had an income \$4,394 below the official federal poverty level -- the third worst of any year since 1963. The poor have grown poorer even though a record 41.5% of all poor people, like the Kadrmases and Marsha Hall, were working

¹³ Virtually two out of five poor Americans (40 percent) lived in families with income below half the poverty line in 1986, compared to one-third in 1980 and less than 30 percent in 1975. That means that nearly 13 million Americans are now living with incomes below half the poverty line. For a family of four, existing with an income below half the poverty line meant living on less than \$5600 for the entire year of 1986; for a family of three this meant existing on less than \$4,550. Center on Budget and Policy Priorities, supra, at 14.

at least part-time in 1986, equal to the highest percentage since 1968.¹⁴

C. Increasingly, Rural Families Have Fallen Into Poverty

The sharp increase in American poverty has taken a heavy toll among farmers and energy workers in North Dakota and in rural America generally. Throughout rural areas of the country, increasing numbers of once-productive residents find themselves without work,¹⁵

¹⁴ Center on Budget and Policy Priorities, Washington, Gap Between Rich and Poor Widest Ever Recorded, August 17, 1987.

¹⁵ Unemployment has risen dramatically in recent years in the non-metropolitan counties of the United States. In 1979, among the 2,400 non-metropolitan counties, only 300 had unemployment rates higher than 9%. By 1985, that number had risen to 1,100, nearly half the total.

without food¹⁶ and often without their land.

The accelerated loss of farms in 1986 is easily documented using Department of Agriculture (USDA) data. Over the course of 1985, some 43,000 farms were lost, according to the National Agricultural Statistics Service count -- 117 farms per day, or one every 10 minutes. Between the end of 1985 and the end of 1986, an additional 60,000 farms vanished from the count, increasing the average rate of loss to more than 165 farms per day, or one farm every 7 minutes -- a staggering 40% increase over the number of farms lost in 1985.

¹⁶ A 1986 study by Public Voice for Food and Health Policy confirmed that a growing number of rural Americans fail to receive food stamps even though they are eligible. From 1979 to 1983, the number of rural poor not receiving food stamp assistance increased by 32 percent, from 5.67 to 7.51 million persons.

Like the Kadrmases, these rural families are most often hardworking, formerly middle-class Americans who have fallen into poverty as a result of broader economic conditions beyond their individual control. These conditions are reflected by traditional indicators: declining net worth and land values, declining prices for farm products, increasing numbers of forced land transfers, and swollen debt loads. The impact has been felt across the board,-- in rural banks, small town retail businesses and the agricultural implement manufacturing industry. With one of every five jobs in America related to food production and distribution, the old adage that economic downswings are both

farm-led and farm-fed has its roots in economic reality.¹⁷

The crisis has been particularly severe in the Middle West -- in states like the Dakotas, Iowa, Minnesota, Kansas and Missouri -- where agricultural and energy workers have been hard hit. In North Dakota alone, an estimated 36,000 children (or slightly less than one out of five) now live in families with incomes below the federal poverty standard.¹⁸ This is true despite the fact that almost 60 percent of mothers with children ages six to seventeen

¹⁷ In 1983 the median family income for farm families was no more than three-fourths that of non-farm families. The farm resident poverty rate of 24 percent far exceeded the poverty rate of 15 percent found for non-farm residents. United States Census Bureau, Money Income and Poverty Status of Families and Persons in the U.S. 1983 (issued 1984) (Series p. 60).

¹⁸ Children's Defense Fund, 1987 Data.

follow the pattern of Marsha Hall and work outside the home.¹⁹

Despite their growing numbers, the rural poor have not become a potent political force. Families like the Kadrmas are a minority within the Dickinson School District, unable through the political process to alter the bus fees which are an insignificant issue for many of their more prosperous neighbors.

D. Poverty Demands Sacrifices From Families like the Kadrmas

The foregoing poverty figures, while disturbing in absolute terms, cannot reveal the daily reality in which poor families like the Kadrmas must survive. A family living at or below the poverty level must do without many things which families with an average income consider to be "necessities" -- a bed for each

¹⁹ Id.

family member, adequate clothing and shoes, school supplies, or an occasional movie. Technically, an income at the official federal poverty level should enable families to purchase the bare necessities of life, since that was the basis upon which the standard was originally conceived. Yet an itemized family budget drawn at that level falls far short of adequacy. Poverty forces families to make untenable choices among their children's basic needs -- for food, for shelter, for health care, for a minimally adequate education.

Food and nutrition is one area where poor families are hardest hit. Because the poverty level food budget for a family of four is pegged at about \$2.55 per person per day (85 cents per meal), many poor people sometimes go hungry, or buy their groceries at markets where day-

old bread and damaged canned foods are sold at discounts. Yet no matter what cost-cutting measures are adopted, a poverty level budget can have serious nutritional consequences, particularly for poor children. The Physician Task Force on Hunger in America estimated in 1985 that approximately 20 million poor Americans experience hunger at some point each month, and that malnutrition affects almost 500,000 American children.²⁰

Health care, an issue closely related to adequate food and nutrition standards, is another area where poor families must make deep sacrifices.²¹

²⁰ The Physicians Task Force on Hunger in America. 1985 Report.

²¹ The record at trial revealed that plaintiff Paula Kadrmas as well as former plaintiff Marshall Hall had significant debts for unpaid medical bills. (Transcript, at 43 and 86 respectively.)

The reason for the inadequate health care which poor Americans so often receive is quite simple -- their lack of money. As the unpaid medical bills of the Kadrmas family reflect, most poor people simply cannot afford private medical care, and many are not covered by insurance.²²

In general, then, poor families at best have restricted access to proper medical attention. The care they do receive is often too late and of low

²² Our nation's employer-sponsored health insurance system has never worked well for millions of low-income families or for irregularly employed workers like Mr. Kadrmas. Thirty percent of all employers who pay the minimum wage to more than half their work force offer no health insurance. Between 1979 and 1984, the number of completely uninsured Americans grew from 26.2 million to 35 million -- a one-third increase in just five years. Of all age groups, children suffer most from weaknesses in the public and private insurance systems. In 1984, children made up one-third of America's 35 million uninsured persons. Children's Defense Fund, A Children's Defense Budget FY 1988: An Analysis of Our Nation's Investment in Children (1987).

quality. Yet the relative need for health care is greatest among those groups -- children and young mothers-- which form a disproportionate share of the population in poverty. Nutritional deficiencies in early childhood can retard brain growth and school performance. This early damage-- sometimes followed by frequent illness and further malnutrition, as well as crowded and unsanitary living conditions -- is exacerbated by a lack of regular medical attention which may affect an adult's ability to obtain adequate employment.

Housing and utility costs represent yet another complicating factor facing poor families. The number of low-income families paying more than one-half of their incomes for rent and utilities rose from 3.7 million to 6.3 million (or

nearly one-half of all low-income households) between 1975 and 1982.²³ In the rural Midwest, where both housing and energy costs have been rising, families like the Kadrmas face a very difficult time just meeting their basic shelter needs. Plaintiff Kadrmas testified, for example, that she paid \$95 per month for electricity and that propane fuel for

²³ Federal poverty guidelines set 30% of income as the amount a family should generally spend on rent or mortgage payments. According to 1987 Census Bureau figures, however, of families earning less than \$7,000 last year, 78% of them spent over this proportion of their meager incomes on housing. According to the same data, the average family earning between \$7,000-10,000 a year spent 59% of its income on housing.

According to a study conducted by the Low Income Housing Information Service, more than 8 million low-income renters were in the market for the 4.2 million units at affordable prices in 1985. This gap -- 4 million units -- is 120 percent larger than it was in 1980. Children's Defense Fund, A Children's Defense Budget FY 1988 supra, 1987.

heat cost the family \$277 every two months. (Transcript, at 42).

"Necessities" for poor families and their children do not end with food, health care and shelter, however. "Education," as this Court has noted, "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."²⁴ Yet to go to school costs money -- clothing, books, notebooks, pencils, gym shoes etc. Even to go to church costs money -- some Sunday clothes, carfare to get there, a little offering. To belong to the Boy Scouts or Girl Scouts costs money -- uniforms, occasional dues, shared costs of a picnic.

²⁴ Plyler v. Doe, 457 U.S. 202, 221 (1982).

E. Poor Families Like the Kadrmas Face Hidden Costs of Poverty Due to a Lack of Financial Flexibility

Poverty carries many implications for the daily lives of poor families, not the least of which is an absence of financial flexibility. It has been well documented²⁵ that the poor often pay higher prices for food, clothing, shelter and other essentials because they cannot afford the steep "search costs" of hunting for lower prices. Bargains almost always require payment up front, a reality which poor Americans can rarely afford. Families like the Kadrmas, faced each month with overdue bills and mounting debts, do not have the financial flexibility to pursue the most economic course of payment when shopping. They

²⁵ See e.g., D. Caplovitz, The Poor Pay More (1967).

frequently end up with lower quality goods at far higher prices.²⁶

The poor's lack of financial flexibility is particularly relevant to the case at bar and the decision regarding school transportation made by the parties. The record reveals that plaintiff Paula Kadrmas refused to pay (or arrange to pay) \$97 "up front" for her daughter's school bus fee while former plaintiff Marsha Hall balked at paying a \$150 fee in advance to cover the busing costs for her two youngsters. Subsequently, the car-pooling strategy which the two families employed in order to ensure their children's attendance at

²⁶ Studies have shown for example, that supermarket chains often charge more for the same food items in low-income areas than in middle-income areas, and use the low-income outlets as dumping grounds for vegetables and meats that have begun to spoil. D. Caplovitz, supra at p. xix.

Dickinson Elementary School and their own compliance with mandatory school attendance laws, proved to cost more than the original up-front fees. Yet the financial illogic of this strategy becomes understandable in light of the multitude of daily financial worries confronting poor families. A family like the Kadrmases -- \$13,000 in debt and uncertain about the employment status of their only breadwinner -- may decide that a few dollars at the gas pump each week seems manageable where a \$97 up-front fee would be overwhelming. The Kadrmases precarious financial position, their pronounced lack of financial flexibility, helps explain why they, like so many poor families, pay more in the long run.

Conclusion

If one were to ask the Kadrmases-- or any poor American family today -- how

they manage to make ends meet, the answer would be simple: they don't meet. The Kadrmas' challenge to the constitutionality of North Dakota's mandatory bus fees stems from the irreducible fact that life at the "poverty line" is a day-by-day struggle for survival, where there is simply not enough to go around.

The parties and other amici undoubtedly will address in detail the constitutional issues. In this brief, we have attempted to remind the Court of the human dilemma that has prompted the Kadrmas family to mount their legal challenge. This Court once eloquently stated that "education is perhaps the most important function of state and local governments... It is the very

AMICUS CURIAE

BRIEF

14
No. 86-7113

Supreme Court, U.S.
FILED

JAN 19 1988

JOSEPH F. SPAETH, JR.

In The
Supreme Court of the United States

October Term, 1987

— 0 —
PAULA KADRMAS and SARITA KADRMAS, a minor
by her next friend, Paula Kadrmas,

Appellants,

vs.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in
his capacity as Superintendent of the Dickinson Public
Schools; CLARENCE STORSETH, NANCY JOHN-
SON, MERRY JOHNSTON, HAROLD KRIEG, HERB
HERAUF, in their capacity as members of the Dickin-
son School Board; RICHARD RYKOWSKY, in his ca-
pacity as Transportation Supervisor of the Dickinson
Public Schools,

Appellees.

— 0 —
On Appeal From the Supreme Court of North Dakota

— 0 —
**BRIEF AMICUS CURIAE OF
THE STATE OF NORTH DAKOTA**

— 0 —
NICHOLAS J. SPAETH
Attorney General
State of North Dakota
(Counsel of Record)

LAURIE J. LOVELAND
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarek, North Dakota 58505
(701) 224-2210

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
I. North Dakota's School Reorganization Statutes.....	2
II. North Dakota's School Transportation Law	5
III. Application of North Dakota's Education Laws in This Case	10
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. Appellants' Claim That North Dakota Law Dis- criminates Against Indigents Is Not Ripe for Adjudication	13
II. Appellants May Not Challenge the Statutes and Policy That Create Benefits That Appellants Are Presently Receiving	16
III. The North Dakota Statutes Challenged Here Should Be Reviewed Under a Rational Basis An- alysis	17
A. The North Dakota Legislation Promotes Clearly Established, Legitimate Purposes.....	21
B. The Reorganization and School Transporta- tion Laws Are Not Irrational Merely Because They Result in Differences Among School Districts	25
C. The Challenged Legislation Contains No State-Created Classifications or Obstacles That Would Render the Law Unconstitutional	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 288 (1936)	16
<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983)	15
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	20
<i>Breckett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985)	14
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	17, 20, 29
<i>Douglas v. California</i> , 372 U.S. 353 (1963)	20
<i>Fahy v. Mallouee</i> , 332 U.S. 245 (1947)	16
<i>Fort Smith Light Co. v. Paring Dist.</i> , 274 U.S. 387 (1927)	26
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	27
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	20
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	19, 29
<i>Herman v. Medicine Lodge School District No. 8</i> , 71 N.W.2d 323 (N.D. 1955)	3, 4
<i>Hodel v. Indiana</i> , 452 U.S. 314 (1981)	17
<i>Holt Civic Club v. Tuscaloosa</i> , 439 U.S. 60 (1978)	26
<i>Jefferson v. Hackney</i> , 406 U.S. 535 (1972)	29
<i>Kotch v. Board of River Port Pilot Comm'rs</i> , 330 U.S. 552 (1947)	26
<i>Lindsey v. Norwet</i> , 405 U.S. 56 (1972)	29
<i>Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration</i> , 113 U.S. 33 (1885)	14
<i>Maher v. Roe</i> , 432 U.S. 464 (1977)	20, 23, 29
<i>Martinez v. Bynum</i> , 461 U.S. 321 (1983)	21
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	26
<i>Milliken v. Bradley</i> , 418 U.S. 717 (1974)	21, 23

TABLE OF AUTHORITIES—Continued

	Page
<i>Papasan v. Allain</i> , 106 S. Ct. 2932 (1986)	18, 26, 28
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	18, 26, 27, 28
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974)	29
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	18, 19, 20, 22, 28
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	20
<i>United States v. Raines</i> , 362 U.S. 17 (1960)	14
<i>United States v. San Francisco</i> , 310 U.S. 16 (1940)	16
<i>Western & Southern Life Insurance Co. v. State Board of Equalization of California</i> , 451 U.S. 648 (1981)	20
<i>Wright v. Council of the City of Emporia</i> , 407 U.S. 451 (1972)	21
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. XIV	26
STATUTES:	
28 U.S.C. § 2403(b)	1
N.D.C.C. § 15-27.3-01	5
N.D.C.C. § 15-27.3-05	5
N.D.C.C. § 15-27.3-08	5
N.D.C.C. § 15-27.3-10	5, 6
N.D.C.C. § 15-27.3-19	6
N.D.C.C. § 15-34.2-03	6
N.D.C.C. § 15-34.2-06.1	6, 9, 10
N.D.C.C. ch. 15-40.1	25

TABLE OF AUTHORITIES—Continued

	Page
N.D.C.C. §§ 15-40.1-16 to 15-40.1-18	10
N.D.C.C. § 15-43-11.2	7, 11
1985 N.D. Sess. Laws ch. 209, § 6	9
1981 N.D. Sess. Laws ch. 184, § 1	9
1979 N.D. Sess. Laws ch. 229, § 1	6, 9
1979 N.D. Sess. Laws ch. 247	7, 11
MISCELLANEOUS:	
Sup. Ct. R. 36.4	1
Report of the North Dakota Legislative Council, 49th Legis. Ass. (1985)	3, 4
Hearings on H.B. No. 1444 before the House Education Comm., 46th N.D. Legis. Ass. (Feb. 7, 1979).....	6, 7, 8, 9, 11
Hearings on H.B. No. 1444 before the Senate Educa- tion Comm., 46th N.D. Legis. Ass. (Feb. 28, 1979).....	7, 8, 9
Report of the North Dakota Legislative Research Comm., 30th Legis. Ass. (Dec. 15, 1946)	4

No. 86-7113

—o—

In The
Supreme Court of the United States
October Term, 1987

—o—

PAULA KADRMAS and SARITA KADRMAS, a minor
by her next friend, Paula Kadrmass,

Appellants,

vs.

DICKINSON PUBLIC SCHOOLS; ROSS JULSON, in
his capacity as Superintendent of the Dickinson Public
Schools; CLARENCE STORSETH, NANCY JOHN-
SON, MERRY JOHNSTON, HAROLD KRIEG, HERB
HERAUF, in their capacity as members of the Dickin-
son School Board; RICHARD RYKOWSKY, in his ca-
pacity as Transportation Supervisor of the Dickinson
Public Schools,

Appellees.

—o—

On Appeal From the Supreme Court of North Dakota

—o—

**BRIEF AMICUS CURIAE OF
THE STATE OF NORTH DAKOTA**

Pursuant to Rule 36.4 of the Rules of this Court and
28 U.S.C. § 2403(b), the State of North Dakota respectfully
submits this brief as *amicus curiae*.

—o—

STATEMENT OF INTEREST OF AMICUS CURIAE

Appellants in this case challenge the constitutionality
of the State of North Dakota's statutory scheme of school
district reorganization and transportation financing.

Those statutes permit each local school district to decide whether to operate as a reorganized or a non-reorganized school district and to control its own school transportation policy.

This appeal, therefore, implicates the substantial interest of the State of North Dakota in preserving the present statutory scheme. In particular, the State has a significant interest in continuing the State's longstanding statutory policy preserving local decisionmaking and control of the implementation of the State's educational system. The State also has an interest in retaining the current method and level of school district transportation financing by the State and local government bodies. Appellants' challenge to the North Dakota statutes threatens these important interests of the State, as well as appellees' interest in retaining their particular busing policy.

—o—

STATEMENT OF THE CASE

I. NORTH DAKOTA'S SCHOOL REORGANIZATION STATUTES.

North Dakota law does not dictate the geographical boundaries of local school districts. Instead, state law permits each local school district to consider its particular population and geographical characteristics and then decide how education will be provided most effectively in that district. This entails consideration of whether the district's taxpayers, parents, and students will be best served by retaining the district's historical geographical

boundaries or by joining with adjacent districts to form one larger school district.

The concept of "reorganized school districts" in North Dakota relates to whether two or more school districts have chosen to enlarge their boundaries by merging and "reorganizing" into one "reorganized" school district administered by one school board. School districts that have not chosen to reorganize with other districts in this fashion are referred to as "non-reorganized" districts. North Dakota statutes authorize school districts to operate either as reorganized or non-reorganized districts.

The concept of "reorganized school districts" first emerged from legislation enacted by the North Dakota Legislature in 1947. See Report of the North Dakota Legislative Council, 49th Legis. Ass. 69 (1985) (hereinafter cited as "Report"); *Herman v. Medicine Lodge School District No. 8*, 71 N.W.2d 323, 328 (N.D. 1955). Earlier legislation had authorized existing school districts to change their boundary lines when petitioned by at least one-third of the voters residing in each affected school district; however, many school districts in North Dakota had not expanded, and a number of districts were still operating very small, one-room schools. See Report, *supra*, at 69; *Herman*, 71 N.W.2d at 328. The 1947 Legislature viewed this system of numerous tiny school districts as financially inefficient and educationally inferior. The system also resulted in inequality in the educational experience for students in different districts. The 1947 Legislature, therefore, decided to enact the reorganization law, which discourages the continuance of many very small school districts and encourages those districts

to reorganize into larger districts, while leaving the reorganization decision within the local school district. *See* Report, *supra* p. 3, at 69; *Herman*, 71 N.W.2d at 328. A report to the 1947 Legislative Assembly described some of the Legislature's concerns:

Due to the inadequacy of the existing school structure in North Dakota as is readily recognizable by small units, inadequately financed operating schools and by still larger units and their inability to raise sufficient operating funds by taxation and through the state aid program, reorganization of school districts under this Act would provide a more nearly equalized educational opportunity for pupils of the common schools, a higher degree of uniformity of school tax rates among districts, and wiser use of public funds expended for the support of the common school system.

Report, *supra* p. 3, at 69 (quoting Report of the North Dakota Legislative Research Comm., 30th Legis. Ass. 6 (Dec. 15, 1946)).

The basic provisions of the reorganization law enacted in 1947 continue in effect today. Many of the statute's goals have been realized as the small school districts have chosen to take advantage of the opportunities available to the larger school districts and reorganize. Other school districts located in more populous areas, like Dickinson, have chosen not to reorganize. Those more populous districts had no need to reorganize because their larger population already provided a sufficient school population and tax base to afford their students and taxpayers the advantages of an enlarged curriculum, increased funding, and a more efficient educational system. The reorganization law, thus, has resulted in smaller districts receiving the

benefits of greater size through reorganization and an equalization of educational opportunity throughout the state.

If two or more school districts become interested in reorganizing, a comprehensive reorganization plan is prepared by a county committee, *see* N.D.C.C. § 15-27.3-01, and that proposed plan is submitted to the public for hearings, *see* N.D.C.C. § 15-27.3-05. The reorganization plan is then submitted to a special election of the voters residing within the territory of the proposed new district. N.D.C.C. § 15-27.3-08. The reorganization takes effect only if a majority of all votes cast within each of the smaller districts that are considering reorganization are in favor of the reorganization plan. *Id.*

II. NORTH DAKOTA'S SCHOOL TRANSPORTATION LAW.

The reorganization law requires a transportation plan to be included in the reorganization plan so that parents in a proposed reorganized district are informed as to how their children will reach the new district's schools. *See* N.D.C.C. § 15-27.3-10. In any reorganization plan, the area of the school district will be expanded and, in all likelihood, the number of schools decreased through consolidation. As a natural consequence, the distance between home and school for many, if not most, students will be enlarged in a reorganized district. Concern about an increased transportation burden could easily discourage parents from approving a reorganization plan. To allay any such fears about transportation, state law requires the county committee to include "adequate and practical" transportation provisions in its reorganization plan. *See* N.D.C.C. § 15-

27.3-10. The transportation may be by school bus or it may be provided by the family. If family-type transportation is used, the family is compensated by the district for that transportation. *See id.*; *see also* N.D.C.C. § 15-34.2-03. The plan itself then informs the voters as to the extent and type of school transportation that will be provided. The reorganization plan, thus, serves as a contract between the new school district and the residents of that district; it binds the school district to the transportation provisions set forth in the reorganization plan, absent subsequent voter approval of a change in the plan's terms. *See* N.D.C.C. § 15-27.3-19.

A reorganization plan is, of course, applicable to only the reorganized district covered by the plan. Non-reorganized districts have no such plan in place, and the transportation component of reorganization plans does not apply to non-reorganized school districts. As discussed above, the reorganization statute's transportation requirement was enacted to encourage reorganization, and that requirement simply is not applied to those school districts that choose not to reorganize.

In 1979 the Legislature¹ enacted the statute challenged here which permits non-reorganized districts to charge a nominal busing fee. *See* 1979 N.D. Sess. Laws ch. 229, § 1. That statute was proposed as House Bill No. 1444 and codified at N.D.C.C. § 15-34.2-06.1.

The Dickinson School District proposed House Bill No. 1444 to the 1979 Legislature because the District wanted to ensure that it was acting within the law in charging a fee for providing transportation service to school. The District had had a busing fee policy in place for a

number of years during which there had been no statutory prohibition of the fee. The District became concerned when it appeared that the 1979 Legislature would enact a statute prohibiting charging the fee. Hearings on H.B. 1444 before the House Education Comm., 46th N.D. Legis. Ass. 12a (Feb. 7, 1979) (hereinafter cited as "House Hearings"); Hearings on H.B. 1444 before the Senate Education Comm., 46th N.D. Legis. Ass. 29a-31a (Feb. 28, 1979) (hereinafter cited as "Senate Hearings").¹ In 1979 the Legislature was considering House Bill No. 1057, a bill which focused on the free provision of textbooks in public schools but which also provided that only fees specifically authorized by statute could be charged by school districts. *See* 1979 N.D. Sess. Laws ch. 247 (now codified at N.D.C.C. § 15-43-11.2). The Dickinson School District administrators felt that, with the passage of House Bill No. 1057, they needed specific statutory authorization to continue the busing fee policy they then had in place. House Hearings, *supra*, at 12a; Senate Hearings, *supra*, at 30a.

The proponents of House Bill No. 1444 advanced several reasons for the necessity of Dickinson's school busing fee and the proposed enabling statute.

The bill's sponsor testified that permitting school districts to charge a small busing fee would allow the districts

¹The February 7, 1979, hearing on House Bill No. 1444 before the House Education Committee and the February 28, 1979, hearing on House Bill No. 1444 before the Senate Education Committee were taped. Those tapes are currently in the custody of the North Dakota Historical Society. The tapes of those two hearings have been transcribed by this office for this Court's convenience and appear in the attached Appendix. Page references to the two hearings are to the page numbers as they appear in the Appendix.

to avoid eliminating busing altogether. He said that if a local school district found itself in a "financial pinch" and faced the prospect of being able to provide no busing service at all, House Bill No. 1444 would allow the school board to charge a small fee to keep the buses running. House Hearings, *supra* p. 7, at 1a; Senate Hearings, *supra* p. 7, at 23a.

The bill's proponents also testified that they believed that the busing fee was a fair way for the school district to administer the school transportation system. In Dickinson, for example, without a busing fee, busing to and from school would be paid for by state transportation payments and local property taxes. All Dickinson taxpayers, therefore, would contribute to the busing fee through their local property taxes, whether or not they used the busing service. In Dickinson approximately 80% of the people comprising the tax base reside in the city of Dickinson; only 20% of the tax base resides in the rural area served by the Dickinson busing system. Local residents felt that it was only fair that the people who actually use the bus service contribute to the cost of that service through a small fee. House Hearings, *supra* p. 7, at 2a-7a, 12a-13a; Senate Hearings, *supra* p. 7, at 25a-26a.

The bill's proponents further testified that they felt that the busing service was a service program provided to the school families for their convenience and that it was not a part of education *per se*. The busing program was compared to a school lunch program: Busing, like a school lunch program, benefits students, but it is not an educational function. Taxes spent on busing are not spent on the provision of education itself. House Hearings, *supra* p. 7, at 5a, 13a-16a; Senate Hearings, *supra* p. 7, at 28a, 32a.

The bill's proponents also testified that even with the fee, bus patrons would be receiving this service at a bargain price. Indeed, under House Bill No. 1444 (and N.D.C.C. § 15-34.2-06.1), the maximum amount Dickinson could charge individuals for the busing fee would amount to about half as much as students at the elementary level were then paying for a hot school lunch. House Hearings, *supra* p. 7, at 13a-14a.

Legislators asked the proponents of House Bill No. 1444 why the bill's measures should be limited to non-reorganized school districts. The then Dickinson School Superintendent Don Benzie answered that, under the reorganization law, several school districts have made a contract by becoming one reorganized district; those districts have thereby mutually agreed that busing will be provided. He felt that it was inappropriate for the Legislature to pass legislation altering this contract reached between the school districts and their constituents. Non-reorganized districts have no such contractual obligations. House Hearings, *supra* p. 7, at 15a-16a.

There was no opposition to House Bill No. 1444. See House Hearings, *supra* p. 7, at 22a; Senate Hearings, *supra* p. 7, at 34a. The bill was enacted by the Legislature, see 1979 N.D. Sess. Laws ch. 229, and is now codified at N.D.C.C. § 15-34.2-06.1.²

²N.D.C.C. § 15-34.2-06.1 has been amended by the Legislature, see 1981 N.D. Sess. Laws ch. 184, § 1; 1985 N.D. Sess. Laws ch. 209, § 6, but the basic provisions of the statute applicable to the Dickinson Public School District remain as enacted by the 1979 Legislature in House Bill No. 1444.

III. APPLICATION OF NORTH DAKOTA'S EDUCATION LAWS IN THIS CASE.

Under the provisions of N.D.C.C. § 15-34.2-06.1, the total amount of the busing fees that may be collected by non-reorganized school districts is greatly limited. Generally, districts may not charge an amount greater than the difference between the state transportation payment³ and either the local school district's transportation cost or the state average cost for transportation, whichever is the lesser amount. See N.D.C.C. § 15-34.2-06.1. In other words, a district may not collect more than it has to pay from local funds for school busing. Dickinson charges only about one-half of even this limited amount. See J.A. 45. Dickinson's fee for one child is \$97.00 per year or approximately \$10.77 per month. See J.A. 44.

No proof was admitted at trial demonstrating that appellants' children were excluded from school or were not bused because of an inability to pay the busing fee. Paula Kadrmas (and Marsha Hall) testified that they had refused to pay the busing fee because they felt that they should not have to do so. See Trial Transcript 49, 90. They did not even make a request that they be given the busing service without any charge as they were unable to afford the busing fee. J.A. 46. They, instead, chose to transport their children to school themselves at a cost greatly exceeding the busing fee. J.A. 46. Indeed, no proof was admitted at trial in this case showing that any child has been

³The state transportation payment is provided to school districts by the State based on the number and type of students transported by the school district. See N.D.C.C. §§ 15-40.1-16 to 15-40.1-18.

excluded from a North Dakota school or from receiving busing service because of an inability to pay a busing fee. See J.A. 45.

There simply are no facts in the record in this case showing whether appellants' children would have been bused had they requested that the busing fee be waived because they could not afford to pay it. It appears likely that appellants would have been given the service had they shown the District that they could not pay the fee.

Indeed, this issue was considered by the 1979 Legislature when it enacted House Bill No. 1444 authorizing the Dickinson busing fee. The Dickinson School Superintendent was asked how the Dickinson School District would deal with people who refused to pay for the busing charge. The Superintendent replied:

Well, I think we'd have to handle it exactly the same as we do our school lunch program or any other program. *If a family is destitute, not able to provide it, those children would be brought to school and nobody would know that they didn't pay the fee.* I think if we had somebody out there that was ornery and had, you know, plenty of money to pay the fee, I guess we'd say you can, your children/child's not gonna get on the bus. Ya know, ya gotta have rules and you got to make them stick, you know.

Senate Hearings, *supra* p. 7, at 32a (emphasis supplied). Further, under House Bill No. 1057 (the bill which prompted House Bill No. 1444 and which was also enacted in 1979), a school board may waive any fee if any pupil or his parent is unable to pay a school fee. See N.D.C.C. § 15-43-11.2; 1979 N.D. Sess. Laws ch. 247, § 2.

Given this legislative history, it is apparent that North Dakota law takes into consideration the special needs of indigents in its school fee statutes.

SUMMARY OF ARGUMENT

Although appellants have raised a claim of wealth discrimination, the record reflects that appellants were not denied the busing service they sought on any inability to pay for that service. This constitutional challenge is, therefore, not ripe for review. Further, appellants are currently taking advantage of Dickinson's busing service and are, therefore, inappropriate parties to challenge the statutes and policies creating that benefit.

In essence, appellants seek free busing service, a service to which they have no fundamental constitutional right. Because no fundamental right or suspect classification is affected by the North Dakota statutes or the Dickinson School District busing policy challenged here, these statutes and this policy should be considered under a rational basis standard of review.

North Dakota's reorganization and school transportation statutes promote and balance several important state interests.

First, the statutes encourage very small districts to reorganize and thereby obtain the financial and curriculum benefits of a larger district. One way state law encourages reorganization is by requiring school districts considering

reorganization to include a provision for "adequate and practical" school transportation within their reorganization plan. This is done so that parents' concerns about possible transportation difficulties in an enlarged school district are alleviated. There is no such requirement for non-reorganized districts where there is no reorganization plan or the resulting concerns about transportation.

Second, North Dakota law permits each school district to decide how its taxpayers, parents, and students will be best served, both as to whether to reorganize and in its school transportation policy. The law, thus, implements the well-established policy of local control of educational matters.

There has been no showing that these policies or statutes have resulted in any child being deprived of a free public education or that any child has been denied access to school because of an inability to pay for school transportation.

The North Dakota legislation challenged here implements the State's interests in a reasonable and fair manner that is in compliance with the Constitution.

ARGUMENT

I. APPELLANTS' CLAIM THAT NORTH DAKOTA LAW DISCRIMINATES AGAINST INDIGENTS IS NOT RIPE FOR ADJUDICATION.

This Court need not reach the difficult constitutional questions presented here because this case is in an ade-

quate posture for disposition on the constitutional grounds raised.

As this Court stated in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985),

We call to mind two of the cardinal rules governing the federal courts: "[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, 362 U.S. 17, 21 (1960), quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

Specifically, this Court should not decide a constitutional question when a statute or policy is challenged on grounds not applicable to the appellant: "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Brockett*, 472 U.S. at 502.

Appellants allege that the Dickinson busing policy, as authorized by North Dakota law, discriminates on the basis of wealth because it "deprives families who are unable to pay the fee of a minimum access to education." Appellants' Brief 1. Yet, appellants did not establish at trial either that their children had not received access to education or that they were unable to pay the busing fee.

Sarita Kadrmas attended the Dickinson Public Schools on a regular basis even though she did not receive busing service. J.A. 46. In no way was she deprived of an education even though she did not receive the busing service.

Thus, appellants were not "deprive[d] of a minimum access to education."

Further, even if access to the busing service itself is considered, the facts in the record do not establish that appellants did not receive that service because they were unable to pay the busing fee.⁴ Indeed, they did not show that anyone who could not afford to get their children to school in North Dakota has ever been denied assistance in doing so. *See supra* pp. 10-11.

Finally, the record shows that appellants paid substantially more money to transport the children themselves than they would have paid for bus transportation under Dickinson's busing fee policy. These facts directly contradict any claim that appellants were unable to pay Dickinson's nominal busing fee, especially as the District accepted partial or delayed payments for the busing service, *see* J.A. 24, 47; Trial Transcript 66.

Appellants, therefore, have not been deprived of a minimum access to education because of any inability to pay a busing fee; they have not suffered the alleged wealth discrimination. This Court should not reach a decision concerning wealth discrimination that would not be applicable to appellants. Under well-accepted principles of constitutional adjudication, this Court should decide the wealth discrimination issue only when it is presented to the Court by a proper party who presents a proper record for the Court's consideration. This particular question is not ripe for constitutional review.

⁴A willful refusal to pay must be distinguished from an inability to pay. *See Bearden v. Georgia*, 461 U.S. 660, 668 (1983).

II. APPELLANTS MAY NOT CHALLENGE THE STATUTES AND POLICY THAT CREATE BENEFITS THAT APPELLANTS ARE PRESENTLY RECEIVING.

As established by the Affidavit of Richard Rykowsky submitted by appellees in support of their Motion to Dismiss, this Court should also decline to decide the constitutional questions raised in this appeal on the grounds that, as to these appellants, the constitutional challenge is moot.

Appellants may not challenge the Dickinson School District's busing policy and the state statutes in question while they are receiving the benefits of that policy and those statutes. This is an "elementary" principle of constitutional adjudication. As the Court stated in *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947),

It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *United States v. San Francisco*, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

By signing the busing¹ contract for the current school year and accepting that busing service, appellants have availed themselves of the benefits of Dickinson's busing policy and the statute authorizing that policy. The busing service appellants seek exists only because of the busing policy and the statutory authorization. In light of its long-established policy of reserving constitutional questions for decision at the appropriate time, this Court should not

pass upon the constitutionality of the challenged policy and statutes at appellants' behest.

III. THE NORTH DAKOTA STATUTES CHALLENGED HERE SHOULD BE REVIEWED UNDER A RATIONAL BASIS ANALYSIS.

Prior decisions of this Court demonstrate that the statutory scheme challenged here should be examined under a rational basis standard of review.

As discussed above, the statutes at issue are primarily concerned with the composition, administration, and financing of North Dakota's school districts. The statutes are, in essence, economic and social welfare legislation that is entitled to great deference in this Court. As Justice Marshall wrote in *Hodel v. Indiana*, 452 U.S. 314, 331-32, (1981),

Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. . . . Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. . . . As the Court explained in *Vance v. Bradley*, 440 U.S. 93, 97 (1979), social and economic legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." This is a heavy burden

See also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The North Dakota statutes and the Dickinson busing policy in question here neither employ any suspect classifications nor impinge on any fundamental rights.

Appellants have raised the specter of both a right to education and an alleged wealth classification to support their argument that an elevated standard of review should be applied in this case. However, both of these contentions must fail.

First, there is no fundamental right at stake in this appeal. Appellants are seeking free busing service. There is no question that there is no fundamental constitutional right to busing service. Even if one accepts appellants' assertion that the right to an education is in question here, that right is not fundamental. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 30-35 (1973), this Court held that, despite the importance of education to today's individuals and society, education is not a fundamental right for constitutional purposes. See also *Papasan v. Allain*, 106 S. Ct. 2932, 2943 (1986); *Plyler v. Doe*, 457 U.S. 202, 221 (1982). As the Court stated in *Rodriguez*,

the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . .

[T]he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

411 U.S. at 30, 35. Therefore, even if the right to education *per se*, rather than the right to busing service, were at is-

sue here, the Court should apply a rational basis standard of review.

Second, this case involves no wealth discrimination triggering the application of a heightened standard of review. Wealth by itself is not a suspect classification. See *Harris v. McRae*, 448 U.S. 297, 323 (1980); *Mahe v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 29. Moreover, the wealth discrimination alleged in the instant appeal is unlike any of the forms of wealth discrimination previously struck down by this Court. See *Rodriguez*, 411 U.S. at 18-19. In past cases dealing with wealth discrimination, "[t]he individuals, or groups of individuals, who constituted the class discriminated against . . . shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* at 20 (emphasis supplied). In *Rodriguez*, the Supreme Court concluded that the appellees had not established wealth discrimination because they had not shown a complete inability to pay for or an absolute deprivation of the desired benefit. *Id.* at 18-29. As discussed *supra* pp. 10-11, appellants here also have not shown a complete inability to pay for a desired benefit or an absolute deprivation of that benefit.⁵

For these reasons, neither the North Dakota statutes nor the Dickinson Public School busing policy demonstrate

⁵It is true that the Dickinson Public School District did not structure its busing fee to reflect each person's ability to pay but, as this Court held in *Rodriguez*, the Constitution does not require the District to establish such a payment schedule, 411 U.S. at 22.

any invidious discrimination on the basis of wealth,⁶ and, like the statutes at issue in *San Antonio Independent School District v. Rodriguez*, they must be upheld if they satisfy the rational basis test.

We must, thus, consider two questions:

(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? . . .

....

Parties challenging [such] legislation . . . cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which [the Court] may take judicial notice, that the question is at least debatable." *United States v. Carolene Products Co.*, [304 U.S. 144,] 154 [(1938)].

Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 668, 674 (1981); see also *Dandridge v. Williams*, 397 U.S. at 485.

⁶There is another important distinction between the prior wealth discrimination cases of this Court and the instant circumstances. In the prior leading wealth discrimination cases, including *Griffin v. Illinois*, 351 U.S. 12 (1956), *Douglas v. California*, 372 U.S. 353 (1963), and *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court found wealth discrimination in the context of cases concerning benefits over which the state has a monopoly. The state has a monopoly in the criminal justice system and in granting divorces. The state has no such monopoly over transporting children to and from school (or over education itself). In *Mahe v. Roe*, the Court held that subsequent Supreme Court decisions "have made it clear" that the principles underlying these wealth discrimination cases "do not extend to legislative classifications generally." See 432 U.S. at 469 n.5, 471 n.6. Absent facts showing monopoly power similar to that in the civil and criminal justice systems, this Court's wealth discrimination cases appear to be inapplicable.

A. The North Dakota Legislation Promotes Clearly Established, Legitimate Purposes.

North Dakota's reorganization and transportation statutes serve several important, legitimate legislative functions.

The legislation first implements the State's and the Court's long-established policy of local control of educational matters. As this Court wrote in *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974),

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See *Wright v. Council of the City of Emporia*, 407 U.S. [451,] 469 [(1972)].

See also *Martinez v. Bynum*, 461 U.S. 321, 329 (1983). This Court also recognized the importance of retaining control of school policy at the local level in *San Antonio Independent School District v. Rodriguez*, where the Court stated:

In an era that has witnessed a consistent trend towards centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.*, at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.*, at 478.

. . . In part, local control means . . . the freedom to devote more money to the education of one's children. *Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.*

411 U.S. at 49-50 (emphasis supplied). This local control policy is particularly important with regard to matters of educational fiscal policy. *Id.* at 40-43.

North Dakota's law, like the statutes considered in *Rodriguez*, allows parents and others in the community to participate in the decisionmaking process, to determine how local education dollars will be spent, and to tailor local programs to local needs.

The North Dakota statutes governing reorganized and non-reorganized districts, first, permit local school districts to decide whether to reorganize or to remain non-reorganized. The law also authorizes local school districts to set their own transportation policy, thereby allowing variance among the districts based on local needs and concerns. In non-reorganized districts, local school boards may decide whether to provide transportation and if transportation is provided, the type of transportation provided, the amount of the fee, if any, charged for the transportation and related questions. Reorganized districts must include adequate and practical transportation provisions in their reorganization plans, but each reorganized district itself determines the extent and type of transportation included in its reorganization plan. Leaving these decisions concerning transportation within the control of the local school districts permits the districts to make decisions based on their local conditions and requirements.

A statutory scheme that allows these judgments to be made at the local level allows school districts, like the Dickinson School District, to decide that a busing fee is better than no busing at all and that, given the composition of their school district, it is fair that the small minority of the people who use the busing service pay a small portion of the cost for that service.

Like poor families, local school districts attempting to survive troubled economic times must make many difficult choices about how to spend the limited funds available to them. In *Maheer v. Roe*, this Court stated that "[o]ur cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." *Maheer v. Roe*, 432 U.S. at 479 (footnote omitted). North Dakota law gives school districts the latitude to choose the most appropriate way to spend those limited funds, to decide what expenditure of funds would provide the greatest benefit to the students within the district. The administrators of these local school districts, not the State or the courts, are most aware of the special needs and problems of their local schools. It is, therefore, entirely appropriate that these decisions about the educational system, including decisions concerning transportation, be made at the local level.

Indeed, this appeal presents a classic case of local decisionmaking tailored to local needs. The Dickinson Public School District local patrons, who are already in a relatively large, populous school district, chose not to reorganize. They then chose to have door-to-door bus service and to pay a fee for that service, saving education dollars for educational functions. *See* I.A. 44.

This appeal also demonstrates some of the problems that would occur if the responsibility for the complex decisions concerning school district structure, financing, and administration were moved from local school boards to the courts. *See Milliken v. Bradley*, 418 U.S. at 743-44. Appellants are asking this Court to decide whether they are entitled to free transportation to school. Appellants have not shown that busing is their only access to school or that they cannot afford Dickinson's busing fee. Therefore, to decide this case in favor of appellants, the Court must decide whether free transportation should be mandated for all students or for, at least, some students. If only for some students, which students? Those who live at what distance? Those with what income levels? Must free transportation be given to those who can or cannot pay and who would like to come to school early or stay late for special tutoring, band practice, debate tournaments, or other school-related activities? Such policy judgments should not be made in this or any court. These decisions should be made by the elected officials comprising local government bodies. That is the purpose of the policy of local control.

North Dakota's reorganization statutes carefully balance the importance of preserving this local control of educational decisionmaking and the Legislature's belief that, in cases of very small districts, reorganization creates a more effective, more efficient educational system.

As discussed above, reorganizing small school districts into one large district generally will provide the students in the newly reorganized district with greater course selection and competition and, in all likelihood, a better educational experience. Larger school districts are also gen-

erally more cost effective.⁷ In most very small districts, therefore, reorganization will result in a better education for more students at a lower cost.

Yet, this is obviously not true in all districts. Districts, like the Dickinson School District, which are already large enough to provide a varied curriculum and an economy of scale, do not need to reorganize to receive these advantages available to small school districts only through the reorganization process. North Dakota law allows those larger districts to retain their present organizational structure.

The statutory scheme, thus, encourages reorganization but leaves local school districts with the authority to decide whether reorganization is appropriate for their circumstances, thereby balancing the State's varied interests.

B. The Reorganization and School Transportation Laws Are Not Irrational Merely Because They Result in Differences Among School Districts.

Appellants have claimed that North Dakota's statutes are irrational because they allow some school districts to charge for transportation (non-reorganized districts) and not others (reorganized districts). The rationale for this distinction has been fully explained above. *See supra* pp. 22-25. Moreover, the distinction is not irrational simply because it brings about different results in different geographical locations within the state.

⁷State foundation aid payments to the local school districts depend upon, among other factors, the size of the school's enrollment. *See N.D.C.C. ch 15-40.1*. Lower per pupil payments are made to schools with higher enrollments because of the cost efficiency in operating larger schools.

This Court has held that a mere difference in geographical application of a statutory scheme does not render that legislation unconstitutional under the fourteenth amendment. In *Holt Civic Club v. Tazewell*, 439 U.S. 60, 70-71 (1978), for example, then Justice Rehnquist wrote:

"The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state." *Fort Smith Light Co. v. Paving Dist.*, 274 U.S. 387, 391 (1927). Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947).

See also *Hodel v. Indiana*, 452 U.S. 314, 332 (1981) ("A claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact.").

Local control will often result in differences among districts. Local decisionmakers may make different decisions based on their individual circumstances. This disparity does not make a statutory scheme implementing local decisionmaking unconstitutional.

C. The Challenged Legislation Contains No State-Created Classifications or Obstacles That Would Render the Law Unconstitutional.

Appellants rely in great part on the Court's decisions in *Plyler v. Doe*, 457 U.S. 202 (1982), and *Papasan v. Allain*, 106 S. Ct. 2032 (1986). Neither of those decisions is applicable to the instant case, however.

Plyler v. Doe presented this Court with very special circumstances. See *Plyler v. Doe*, 457 U.S. at 236 (Powell, J., concurring) ("I . . . write separately to emphasize the unique character of the cases before us."). The influx of illegal aliens is a problem of serious national proportions, see *id.* at 218-19, and the Texas statute in question in *Plyler* was apparently unique. These very special circumstances led to the Court's decision in that case.

We have no such special circumstances here. The North Dakota statutes and the Dickinson busing policy, unlike the Texas statute struck down in *Plyler*, obviously do not single out illegal aliens or any similar suspect or quasi-suspect class.⁸ In *Plyler*, the Court held that the states have no power to classify aliens. 457 U.S. at 225. The only classification made in the North Dakota statutes concerns school districts' organizational status, a matter strictly of educational administration. There is no question that state and local governments have primary authority over educational matters. See *supra* pp. 21-22.

Another distinction between the instant appeal and *Plyler* is that the *Plyler* decision dealt with the right to education *per se*. In *Plyler*, the plaintiffs suffered a total deprivation of access to education. As discussed above, *supra* p. 10, no such deprivation has been shown in this case.

⁸In *Plyler v. Doe*, the Supreme Court stated that "undocumented aliens" are not a suspect classification triggering the strict scrutiny test. 457 U.S. at 223. However, alienage in general has, in the past, been treated by this Court as a suspect classification, see *Graham v. Richardson*, 403 U.S. 365, 376 (1971), and considerations unique to aliens may have affected the decision in *Plyler v. Doe*.

Finally, in *Plyler* no question was raised concerning local governing bodies' right to determine what constitutes a part of "education." *Plyler*, thus, did not address issues of local control, issues that are of primary importance in the instant circumstances and the *Rodriguez* decision. See 457 U.S. at 239 n.3 (Powell, J., concurring). For these reasons, this Court's decision in this appeal should be guided by its more relevant prior decision in *San Antonio Independent School District v. Rodriguez*, rather than its decision in *Plyler v. Doe*.

Similarly, the recent decision in *Papasan v. Allain*, 106 S. Ct. 2932 (1986), does not control this appeal. The Mississippi statute challenged in *Papasan*, by its own terms, established school district funding provisions that created an extreme difference in the amount of funding given to public schools in different districts. *Id.* at 2935-38. The instant case involves no such state-imposed differences in school district funding. Local school districts decide whether or not to reorganize. They decide whether to offer transportation and, if so, what type of transportation to offer. They decide whether to charge for transportation and whom to transport. The State provides funding based on the number of students that the districts actually choose to transport. The State leaves the decisionmaking to the local school districts. There is no state-imposed inequality in funding in this case as there was in *Papasan*. Thus, *Papasan* is not dispositive of this appeal.

In essence, appellants are requesting that the State and the District be required to subsidize their lifestyle choices. Appellants need busing service because they chose to move to New Hradec, knowing that the schools were located in

Dickinson. See Trial Transcript 42, 73.⁹ Appellants now want to have free busing service provided them because they decided not to sign a contract to receive busing or to make any commitment to make a bona fide effort to pay for that busing. The State and the District should not be required to subsidize choices that appellants have made of their own free will or to remove obstacles that appellants have created themselves. See *Harris v. McRae*, 448 U.S. 297, 316, 318 (1980).

Giving free transportation to every student may be a laudable goal, but it is not a goal that is constitutionally mandated. Simply because a service may be desirable does not mean that the federal Constitution requires the State to provide that benefit. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) ("the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required"). Similarly, even though transporting their children to school may be inconvenient for appellants, the State and the District are not constitutionally required to remedy that problem. See *Maher v. Roe*, 432 U.S. at 479 ("The Constitution does not provide judicial remedies for every social and economic ill," *Lindsey v. Normet*, [405 U.S. 56,] 74 [(1972)]."); see also *Rodriguez*, 411 U.S. at 39 (holding that the Legislature need not solve every problem in one piece of legislation); *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972); *Dandridge v. Williams*, 397 U.S. at 486-87.

⁹Appellants chose to live in New Hradec because they "[have] horses and [they] liked it out there." Trial Transcript 42.

The State of North Dakota and the Dickinson Public School District have attempted to establish and implement education laws and policies that are of the most benefit to the largest number of citizens of the State and the District. The legislation and policy in question promote legitimate interests of the State and the District and are rationally related to furthering those interests.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the North Dakota Supreme Court and hold that the challenged statutes and the Dickinson Public School's busing policy are in compliance with the federal Constitution. In the alternative, this Court should dismiss this appeal on the grounds that it is inappropriate to decide the constitutional questions raised in this case at this time.

Respectfully submitted,

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
(Counsel of Record)

LAURIE J. LOVELAND
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarek, North Dakota 58505
(701) 224-2210

Attorneys for Amicus Curiae

Dated: January 18, 1988

HEARINGS ON HOUSE BILL NO. 1444 HOUSE EDUCATION COMMITTEE 46th North Dakota Legislative Assembly February 7, 1979 Tape 26, Sides 1-2

Chairman Knudson: Representative Wald, we're ready to take up House Bill 1444.

Representative Wald: Thank you, Chairman Knudson, members of this illustrious Education Committee.

Unknown: Bring this man back again.

Representative Wald: I appear on behalf of House Bill 1444. This is at the request of my superintendent of schools, Mr. Donovan Benzie, who, I believe, has been here a time or two. As I understand House Bill 1444, this is a law that would alleviate a situation where it's an all or nothing situation. If the school board found itself in a financial pinch and would perhaps have to curtail busing service, this would simply allow the school board to charge a fee for busing services, and if you go on and read the bill, it can't exceed certain limits in the bill and that sort of thing. I think it's a good piece of legislation because as I said before, it would simply prevent an all or nothing situation where the school board could charge a small fee for the transportation of those students riding that bus. And I would hope that your Committee would look upon it in a favorable light. At this time, Mr. Chairman, I would like to yield to other people who would like to testify on this bill. If there's any questions, I will remain here and try and answer them.

Chairman Knudson: Thank you. Mr. Benzie, are you next?

Don Benzie: No.

Margo Hassebrook: Good morning, Representative Knudson and other members of the Committee. My name is Margo Hassebrook, and I'm a taxpayer and patron of Dickinson District No. 1. I'm appearing here this morning as a single parent and a mom of three school age children and as a strong supporter of free public education. But I see that busing service does, in my opinion, does not fall under the realm of what I consider a, a part of the free public educational experience. It's a service, just as the service that my kids get when they get to eat hot lunch at school for a very nominal fee. I, I was very supportive of the Dickinson district when it decided to go into the busing service and provide this for our rural patrons, for the people that they can be reimbursed for. However, I think that, that there's still some discrepancy between, between what the district is reimbursed for and, and some local costs and I feel that this money could be better put to use as, for textbooks or library books. We have had a real problem with that in our district, and I just feel that since this is a very special service which is right now not being offered equally to all the students that, that they should, the school district should be able to charge the nominal fee to help cover the cost that the local district incurs in this. And I hope at some point it's a service that will be extended to all of us. We live about a mile and a half from the school, and since I have a full-time job, I recognize how difficult it is to juggle kids back and forth to school. And it's a service that I ~~really~~ wish

sometime would be extended to my kids, too. Thank you very much.

Chairman Knudson: Thank you. Are there questions from the Committee? Representative Mattson has a question.

Representative Mattson: Mr. Chairman, ma'am. What is the present make-up, since the Dickinson School District's the one in question or it's been brought to our attention? What's the present magnitude of your district in terms of what's the distance? You know, what are the geographic boundaries or whatever of your school district?

Hassebrook: Could I ask that that question be directed to our superintendent? I really couldn't tell you in terms of miles. I know that we extend into, outside of the confines of Stark County, but I couldn't tell you in terms of miles.

Representative Knudson: We can look at the map to find out what the outlines for the district are. Run your finger around the district there, Benzie, so that . . . can see the size of it. Other questions from the Committee? Representative Hoffner.

Representative Hoffner: Mr. Chairman, ma'am. You're a mile and a half out of Dickinson?

Hassebrook: No. I'm sorry if I gave you that impression. I'm a mile and a half from school that my children attend. I live within the city limits, however, so, so I, they are not eligible to participate in a school busing program.

Representative Berger: Just a moment. Mr. Chairman.

Chairman Knudson: Representative Berger.

Representative Berger: Do I understand it right then that, that you want them to be transported within the city limits?

Hassebrook: Well, I guess that, that's the subject of another bill, but what I am saying this morning is that I feel that since some children are being given this privilege within our district, which, a service which I consider to be a service, I think that, that maybe they should be willing or that the school district should be able to levy a nominal fee for that service to cover the costs which are not covered under the reimbursement program from the state.

Representative Berger: Mr. Chairman, may I continue?

Chairman Knudson: Continue.

Representative Berger: When you say some children, some children, are they within the city limits?

Hassebrook: No. No, I'm saying the children who fall within the regulations of the law now, but it does not extend equally to all kids in the district.

Chairman Knudson: Representative Mattson.

Representative Mattson: Mr. Chairman, ma'am. You live a mile and a half and you wish for, someday for, for busing to be extended to you?

Hassebrook: I would sure like that. You bet.

Representative Mattson: And you presently juggle your kids back and forth?

Hassebrook: Yes, I do, and I feel that that costs me, in, in gas mileage for my car and time that I take off from my job which I have to tack onto the end of my work day.

Representative Mattson: Mr. Chairman, ma'am. What about the children then that live in the rural areas in that their parents, wouldn't busing be an essential way for them to get to school?

Hassebrook: I think it's an essential service, yes, but I still think it's a service. My personal opinion is that it is still a service. It is not part of their educational experience.

Chairman Knudson: Representative Olson, did you have your hand up?

Representative Olson: Well, I have a question. Maybe, maybe, I don't know your name. . . .

Hassebrook: Margo Hassebrook.

Representative Olson: Okay. Maybe you aren't the one or maybe you don't care to answer, I don't know, I was just wondering in looking at the bill, if anybody has any, you know, what would be the difference just a, in the state transportation payment and the state average cost? How much money is involved, that's what I wanted to ask and maybe if somebody . . .

Chairman Knudson: We'll get to Mr. Benzie here shortly. He knows all the dollar figures.

Representative Olson: Yeah.

Chairman Knudson: Representative Hoffner, it's you I guess.

Representative Hoffner: I'll just ask this last question here. Mr. Chairman, and ma'am. How, how much farther is it to where the busing service starts from where you live? Are there neighbors being bused from your neighborhood?

Hassebrook: No, because I live within the city limits and I go (inaudible) from, from, the elementary, my kids are still in elementary school. So, it goes by so many miles to elementary school and so many miles to the high school. Four miles to the high school.

Chairman Knudson: Thank you. Any more questions? Mr. Benzie? Mr. Nodland. Senator Meyer.

Representative Meyer: Didn't we have a bill that related to this in terms of hauling them?

Unknown: Yeah, we did.

Unknown: City bus.

Unknown: City, it was on city busing.

Chairman Knudson: On which the Committee recommended do not pass. That was within the city, though. And the, the House agreed that it should not pass.

Unknown: Yeah.

George Nodland: Mr. Chairman, members of the House Education Committee. My name is George Nodland. I am a member of the Dickinson School Board, and I'm also a rural bus patron of the Dickinson School District. I would ask you to support Bill 1444 and recommend a do pass. As a rural bus patron, the Dickinson School Board provides me with door to door bus service for my children, a service that is not provided to the majority of the chil-

dren attending the Dickinson School District. Therefore, I feel I should pay a fair share for this service. In doing so, I feel I am ensuring the continuation of the bus service to the rural area. At the present time, all the bus patrons pay a bus fee in the Dickinson school system. The bus fee, fee was set up at the request of majority of the rural bus patrons, and since the program was put into effect in 1974 or 75, our patrons have been very happy with our bus program. I, as a board member, I also feel it is important that the school boards be given flexibility in members of this kind, matters of this kind, so that we can respond to the request of our people. Now, like Margo says, I definitely feel with the financial crunch that the school boards are having today, that we, we have to, this gets into another matter, but I feel we have to consider what is a service and what isn't, and I feel with the small fee that I pay, I have two children, and it, I pay \$62.50 a year. And there's no way that I can haul my children to school for \$62.50 a year. And I, I feel the majority of us rural people are in favor of it, and we feel that it's a, a service that must be provided, and we feel we, we can pay for it. Thank you.

Chairman Knudson: Representative Olson has a question.

Representative Olson: Mr. Chairman and Mr. Nodland. How is that fee assessed, per child or how far you are from the, how far the bus . . .

Chairman Knudson: Per child.

Representative Olson: Just per child, no matter how far you travel?

Nodland: And it's declining in the amount of children that you have.

Representative Olson: I see.

Chairman Knudson: Representative Berger.

Representative Berger: Is this a district-operated bus service?

Nodland: Yes.

Representative Berger: It is district-operated? I'm wondering about the legality of charging?

Nodland: I'm gonna have to go to my superintendent for that.

Representative Berger: What?

Nodland: You'll have to direct that to Mr. Benzie.

Chairman Knudson: He'll be up here shortly.

Representative Berger: I shouldn't have asked that, should I?

Unknown: No.

Chairman Knudson: Someone else had their hand up. Representative Leibahn.

Representative Leibahn: Mr. Chairman, just a comment. I mean, part of the, when we organized in our school districts, one of the things that we . . .

[GAP AT END OF SIDE ONE OF TAPE]

Ed Raymond: Mr. Chairman, members of the Committee. My name is Ed Raymond representing the Fargo Public

Schools. The Fargo Board of Education is in favor of this bill. I think several good elements have already been mentioned, but it certainly, as an example, we have 30, approximately thirty-five hundred students who are living more than one mile from school, some up to four miles, even within the city limits. We feel that this bill would give us some flexibility in our total transportation plan. I'm sure that you're familiar with some of the bus problems in Fargo from previous bills that have been entered. But we're interested in this because it does provide an alternative for boards to consider. There are a number of other elements. I think the safety element, with the number of interstate highways that intersect the larger districts. We do have problems with children who are crossing these heavily traveled areas within cities. We also have a number of private operators now within the city who are busing students to various school, but the Board has no control over those particular private operators. I think also we should, we should consider the expense factor, the environmental considerations. Certainly if we have students on buses instead of in private automobiles, it is a saving to both the district and the consumer of that transportation service. So, the Fargo Board is in favor of this bill.

Chairman Knudson: Thank you. Any questions for Mr. Raymond? Thank you. Oh, Representative Erickson.

Representative Erickson: Mr. Chairman, ma'am. Would the Fargo School District qualify under this bill? Are you non-reorganized?

Raymond: I believe we are. Yes.

Representative Erickson: But then you have the two-mile limit as far as state aid is concerned. You wouldn't be able to go for that. For part of your support, part of your students.

Raymond: Part of your students. Right.

Representative Erickson: So, you'd have to calculate what, who would be eligible.

Raymond: Yes. But there are some isolated pockets in the district where there are transportation problems we'd be very interested.

Chairman Knudson: Representative Dick.

Representative Dick: Mr. Chairman. Do I understand, well, I do I guess, that already they are charging a fee, and all this bill will do is make it legal? Is this what this bill is for?

Chairman Knudson: Let's wait till Mr. Benzie gets up here. You're right, Mr. Dick, that's, that's about what it is.

Chairman Knudson: Representative Larson.

Representative Larson: Ya, I have a question here, Mr. Raymond, if I may (inaudible). How about private schools in your area now? Would that, would they get involved or, you, do you, do you want them to pay and ride on your bus if you go right by their door and so forth? This is what comes to my mind. I'm talking about . . .

Raymond: I imagine they could become involved, depending on the capacity, yes.

Representative Larson: Yeah, that's what I was wondering. Now this, this bill would give them an, allow them

an opportunity to get on the bus where they wouldn't be able to provide the bus themselves, but maybe two or three would ride on your school district bus. That would be permissible, right?

Raymond: Yes.

Chairman Knudson: That's permissible now on public buses.

Raymond: Yes. Yes.

Representative Larson: Oh, it is.

Chairman Knudson: If they don't deviate from their normal routes. That came through the Legislature some years ago. Other questions for Mr. Raymond? Thank you. Now Mr. Benzie.

Benzie: Mr. Chairman, members of the Committee. My (inaudible). I thought if I brought people down to testify this morning, I wouldn't have to do this, but I guess I'm gonna be happy to . . .

Chairman Knudson: Well, we wouldn't let you get away.

Benzie: . . . visit with you about House Bill 1444. There have been some questions. Would you like me to address the questions that have been already been asked, Mr. Chairman?

Chairman Knudson: Perhaps that is what you should start with.

Benzie: First of all, relative to the legality of charging a busing fee. In searching the blue book, there is nothing in the blue book that says that it is illegal. There's a reference made in the blue book made to the fact that a

busing fee may be charged for out-of-district students, and there's also a reference in the blue book that says that you can't, cannot charge out-of-district students anything that you, unless you can also charge in-district students. So, you can turn it around any way you want to. Mr. Snortland and I have been on a stand-off position on this situation for quite some time and he's not here to testify for the bill nor is he here to testify against the bill. I do, however, agree that unless this bill is passed from this point forward, which I, because I am quite sure that the textbook bill which specifies fees that can be charged, I'm sure that will pass. I assume it will, and if that bill passes, then we would definitely need to have it spelled out specifically in the law in order to make it legal to charge a busing fee, and so I feel it is important that we pass this legislation for the reasons that have been mentioned and for the reason that we feel that with the passage of, what is it, 1057, the passage of 1057, then we would recognize it as being illegal to charge a busing fee. We had, over the years, tried many different kinds of transportation organizational set-ups in our district. For years we had contracted buses. We ran into much difficulty because we couldn't control the kind of service that was offered with each of the individual contractors to their patrons. And when the bids reached a point where we felt we could operate at a lesser cost by going to school district buses, the Board decided to do this. Because of the cost element and time element, certain restrictions were placed on the busing service. And after about two years of great turmoil, the rural patrons of our district came in and said, "look, we would like to be a greater part of the decisions, be able to have a greater part in the decisions that, that are being made

relative to busing. And to assure us of this kind of greater participation, we would like to share in the cost." At the time this was done, about 80% of our tax base was, was in the city of Dickinson. About 20% of our tax base was in the rural area. We, we received a great deal of comment, our Board did, by many city patrons questioning the, the fairness of, of providing services to those students, busing service to those students out of the area and with all of the service going to 20% of the tax base. So it's been a, there's been a lot of discussion about this. Since the inauguration of the busing fee at the request of the rural patrons, we have had no major complaints to the service or questioning the, the granting of the service. The total cost to the local district in our situation, our total busing program costs \$101,297.

Unknown: Would you repeat that, please?

Benzie: One O one, two, nine, seven. The local district's share of this amounts to \$22,075. Our present busing fee brings in \$13,132.

Unknown: What was that number, again?

Benzie: \$13,132. Leaving a balance of 8943 to come out of the general fund. Now, the average cost for all of the, for the number of pupils that we transport, the average cost per pupil borne by busing fees amounts to \$24.32 a year. Or 14¢ a day. If a district, if our district were to go to the situation where we were, where the busing fee were to pick up the total local cost, a question that might come up, the average cost per year per pupil would be \$40.88 or 24¢ a day. Everyone in our district looks upon busing as a service, as they look upon our school lunch

program as a service, which is provided to children on an optional basis. Our students at the elementary level pay 40¢ a day for, for a, a warm meal. So, at the outset, the maximum amount that could be charged or would be charged, would be about half as much as they pay for their noon lunch, for a ride to school. We have a lot of patrons in our district that live more than two miles from school that don't get bus service because of the way our community is, is organized. We, the city of Dickinson is located two miles from the western edge of the school district. So, when we, when we move to the, in the, when we look at the school district, Dickinson is located two miles from the western edge. So, we, a two-mile limit puts you out two miles from our city limits. You're outside the school district on the west. North and south, we run a long way. To the east we run halfway to Taylor, halfway to Killdeer on the north, and halfway to New England on the south. Because our community is stretched out like this and because of the location of our buildings within the district, we established a busing limit of four miles to high school and three miles to elementary. The reason is that the high school is located a mile further away from our people, from all of the elementary schools than the, than the elementary schools are. So, if you have a family located out there, you are, you could be four miles from high school, as far as the high school student is concerned, and end up being only three miles from the, the elementary that you'd be going to. So, we had to have a, in order to not pick up certain children from a family and not other children, we had to have this multiple situation. We went to this in order to bring, to take our, to place all of our people within the city limits outside of the busing, you know, within this

area. So that's why we have this busing four-mile and three-mile limit, which we provide service. We have a lot of people living within that area, of course. (Inaudible.) I think I've tried to answer all the questions that, that come up to me before I got up here. Are there other questions?

Chairman Knudson: Somebody asked a question about the non-reorganized district line in the bill.

Benzie: The, it is my opinion that a reorganized district, in the, in the setting up of a reorganized district, several districts have come together and made a contract. Made a legal contract on how they're going to operate from that point on. And in that contract, they have mutually said busing will be provided. So, I don't think that we would pass, that a law be passed to break contracts that have been made in the past between school districts. We've, so, we've just suggested that this bill have an effect on those districts that are not, that are not reorganized.

Representative Berger: Mr. Chairman.

Chairman Knudson: Representative Berger.

Representative Berger: Well, gentlemen. Your assumption is then as long as people don't object to what you're doing, then it's legal?

Benzie: No, it's not. No, it's not.

Representative Berger: Oh, well . . .

Benzie: But I do think that, that, that we should be able to, when, when services, when it comes to services, I'm all for free education and I think that we have to have laws to establish that. And, but I think when it comes to

providing optional services, that school boards should have a great deal of leeway in, in doing this so that they can react to the request and the, the attitudes of the people that they serve. And I think this is an area that, where school boards should be able to, to react to the wishes of the people in the school district.

Chairman Knudson: Representative Larson has a question.

Representative Larson: Mr. Chairman and Mr. Benzie. I guess I come back to the reorganized district. In other words, you don't think they should be included?

Benzie: Well, I think that it, it's a much more complicated thing because they have already made a contractual agreement between one school board and another or one school district and another school district. They've made a contract that is an ongoing contract, and I don't think that we feel that, that this may be the way that this should contract should be broken. I guess is the way I feel about it. I think that they should have this option, but I don't think I want to get, they've already made a contract. So, I think we have to live with that.

Chairman Knudson: Representative Hoffner, I believe you're next?

Representative Hoffner: Yes. Mr. Chairman and Mr. Benzie. Now the lady that testified, would you come into, into the city limits then and pick up those children?

Benzie: I don't, I wouldn't attempt to answer that question, because I think that what she was saying is that she would like to have service brought into the city limits, and, however, feels that since it isn't and since she bears the tax burden plus the personal burden of trans-

porting her children, that it's only fair that the people who receive the service are paying a portion of it.

Chairman Knudson: Representative Mattson is next.

Representative Mattson: Mr. Chairman, sir. Correct me if I'm wrong but in your testimony, you stated that the bill was, if this bill's passed, that with the passage of 1057, the textbook bill, you'd feel that you'd be held to be outside the constitution?

Benzie: Outside the, outside the, because in the textbook bill, it spells out specifically what fees a school board may charge, and it states, as I recall, I can't quote it verbatim, but I think it states that "and any other fee that is specifically so designated." And I think that, that we are, that it is, there is no law that it specifically so designates. I think we are, we're reaching, I'll admit it, and we're reaching because our people wanted us, asked us to reach in this situation.

Representative Mattson: Mr. Chairman, I have a comment. This bill pertains to 15-39.01. That section of law deals with reorganizational, reorganized school districts.

Benzie: Yes, it covers that. That part of the bill is in there, but it doesn't, it doesn't eliminate that section. I don't think.

Chairman Knudson: No, it, the school board of any school district which has not reorganized pursuant to article III of chapter 15-53.1. So, it's staying out of that chapter. Representative Black.

Representative Black: Mr. Chairman, Mr. Benzie. What about the people that can't or won't pay? What do you do then?

Benzie: I don't know, because we have not had a single non-pay situation in this since we've been operating. I know it sounds strange, but it's true. We eliminated practically all the fees, well, all the fees except class dues and that sort of thing, a long time ago in our district. So, our patrons don't pay a lot of, haven't paid a lot of fees for quite a number of years, and they, well, the rural people, ya know, are still the same people basically that were involved at the time when they decided they wanted to ask us to put it, to make it this way. We just had no really, we've had really no problem. We, the fees are paid at the beginning of the school year in total, and they'll come in, you know, a lot of farmers will come in and say "well, we're selling next week or next, we're gonna wait for three weeks" or something like that. And it's always handled very, very quietly and very peacefully. We haven't had a problem like this.

Chairman Knudson: Representative Meyer.

Representative Meyer: Mr. Chairman, Mr. Benzie. Would this allow buses from a reorganized school district to go into a non-reorganized school district to pick up children (inaudible).

Benzie: I don't think so. I think it speaks to the, the district.

Chairman Knudson: The school board of any school district which has not reorganized.

Benzie: Ya, any non, this, you have to be a non-reorganized school district to, you know. Is that your question?

Representative Meyer: We have cases where we have a lot of districts that are not reorganized. These buses pass through 'em and now they don't pick 'em up, and I'm wondering for a fee if this would allow these buses from the reorganized school districts to pick up those that are not reorganized.

Benzie: Oh, I think that you mean out-of-district students?

Chairman Knudson: Maybe if the school board of this non-reorganized district made a deal with the reorganized district.

Benzie: I think you could. I think you can, I think you could charge for, very specifically you could charge.

Representative Meyer: They would still all go to the same school.

Benzie: Yeah, well, you can, you can charge for out-of-district transportation. I mean, that's in the bill. I mean, that's already in law.

Chairman Knudson: Other questions for Mr. Benzie? Have we got this bill clear now so that we don't have more questions on it? Is there . . . Representative Larson.

Representative Larson: Just one question here, Mr. Chairman, Mr. Benzie. This has to fit your situation. Do you know exactly how many other areas this could to apply to (inaudible).

Benzie: I am sorry, I don't know how many non-reorganized districts there are in the state.

Chairman Knudson: Representative Mattson.

Benzie: I'm sorry I don't.

Representative Larson: I was just wondering. I mean, it could have a bearing on . . .

Benzie: I don't think there . . .

Representative Larson: Would you say 10, 20?

Benzie: Gosh, I, I, just I, I don't have any idea.

Chairman Knudson: Probably more than that.

Benzie: In our area, there wouldn't be very many, out in our area. I know that because all of our districts have grown. The districts that are one township, you know, and that sort of thing are more than likely non-reorganized, you see.

Chairman Knudson: Mattson has a question.

Representative Mattson: Mr. Chairman, sir. Do you feel busing to be an essential service to all of education (inaudible).

Benzie: No, I don't think that busing has a thing to do with education. I think busing has something to do with gettin' kids to school. I think, you know, but I think the only thing they learn on that is how long it takes. You know, how long you have to grit your teeth to sit in order to get to school. And I have long said, I've long been a person who has said there's no relationship to coming to school and what happens at school. At least I hope not. I know there are a lot of things they learn on the bus that they don't learn in school.

Unknown: That's for sure.

Benzie: But really, no, I don't see it, I see it as a service. I see it as an essential service in, in our state, and

I think it's a service that we may be going to have to expand if, if we are looking at a true energy crisis and that sort of thing. You know, I guess it's something that we look at as we're gonna have to cope with it as it comes along. I know that right now we have probably 2,000 students that are driven to school by automobile in our district. That's a lot of cars movin' around town in the morning. And, and you know, like mothers will tell me, you know, it's five blocks at 20 below zero for a first-grader is no worse than being 20 miles out. You know, you gotta get the car out, and you gotta take them to school. They're not gonna send them on foot, five blocks away at 20 below zero in, in 20 mile an hour winds, you know. So, and those patrons tell us, you know, you have a responsibility to us, too, and we say, yes, but we, we're not going to give it to you right now, ya know. That sort of thing. But, I mean, you know, the patron, the mother with a little child who's ten blocks from school is, you know, he's not gonna walk to school. They're gonna freeze. And, so, you have an awful lot of cars delivering kids in the morning.

Chairman Knudson: Representative Larson.

Representative Larson: Yeah, Mr. Chairman, Mr. Benzie. Now you get state payments now apparently?

Benzie: This is true.

Representative Larson: Now is this gonna cause any problems with the state if you expand this service?

Benzie: Well, we're not looking to expand it because I, because I think that the state payment as we see it is going to determine the regulations as to what we do,

you know. If we go beyond that, if we provide busing within the state limits, we'll have to pay for that 100% ourselves. And I know our district is not in a position to, to add on this much, this local expense out of the general fund. There just is no way they can do it.

Chairman Knudson: Other questions? Thank you, Mr. Benzie.

Benzie: Thank you, ladies and gentlemen.

Chairman Knudson: Are there any, any other proponents? Anyone else who wishes to speak for House Bill 1444? Is there anyone who wishes to speak against 1444? Any opponents? If not, we'll close the hearing.

HEARINGS ON HOUSE BILL NO. 1444
SENATE EDUCATION COMMITTEE
46th North Dakota Legislative Assembly
February 28, 1979
Tape 40, Side 1

Committee Chairman: Okay, the Committee will open the hearing on House Bill 1444. Is the sponsor of the bill here? Did you give 'em, have you contacted 'em?

Unknown: (Inaudible.)

Chairman: Okay.

Representative Francis Wald: Thank you very much, Mr. Chairman, I'm glad to be back before your Committee again. I won't spend a whole lot of time on House Bill 1444. I introduced this at the request of our local superintendent of schools and school board. And basically what the bill does, I believe it's very simple, I'm sure you've heard that from (inaudible) many times before. But this, this bill is to prevent an all or nothing situation or a boom or bust concept. It simply allows the local school district to charge a fee to bus patrons if in the judgment of the school board, the school district found themselves in a financial pinch and rather than having no busing service at all, it will allow the school district to charge a small fee or whatever they feel is necessary to keep those buses running. I have no conflict on this bill. I live in the city limits and my kid cannot ride the school bus. But I do feel that it's good legislation and that they can charge us this fee to keep those buses going, and I don't think any farmer or whoever's children ride that school bus would object to, whatever the demand, it'd be 50¢ a day or

so much a mile, whatever formula they decide to work out to keep the bus service going, and I, I can't imagine any farmer who lives any distance from town could haul them as cheap themselves and with the energy situation as it is today, I think it's, it's good legislation and I would hope that your committee will look upon it favorably. With that I will yield to representative of the school district Superintendent Benzie from the Dickinson School District, if I may, at this time.

Chairman: Okay, thank you, Representative Wald. Would you take the, take the lectern, please.

Clarence Storseth: Mr. Chairman, members of the Committee, I am Clarence Storseth. I'm the board chairman of the Dickinson Public School District #1. I am only here to support this House Bill 1444. Without taking a lot of your time, I'd like to present my comments to our Superintendent Don Benzie who wrote the bill and is very familiar with it as he testified before the House Committee in support. If that's okay, I'd just like to do it that way and save some of your time.

Chairman: Okay, thank you, Mr. Storseth. I might ask this question now. This, this would be over and above the regular transportation paid by the state. Right?

Don Benzie: Mr. Chairman. I'm Donovan Benzie, the superintendent of schools in Dickinson. We are an un-reorganized, non-reorganized . . .

Chairman: Oh yes.

Benzie: . . . district. And we have been looking at this particular problem, the busing problem, for quite some time,

and from the standpoint of restrictions placed upon the school district by themselves because of the expansion of our community and also restrictions placed upon the district as relates to legislative action, setting minimum and maximum fees where you, where you try to (inaudible) that they be provided and so forth. Several years ago, our busing program, it expanded to the point where we felt that the school district was spending an unproportionate amount of money for a small percentage of the student body, and we were getting considerable discussion from patrons living within the city limits of Dickinson relative to the unfairness of providing services for part of the patrons and not for others. At that, at that point approximately 80% of the funds being expended, local funds being expended, for transportation were coming from the patrons who were not receiving the services. So there's a conflict of concept prospect before us at all times in this situation. As a non-reorganized district, the Dickinson School Board has the authority to discontinue busing by action of the Board. And this is a great concern because of the rural patrons, because they feel that they need the busing program, want the busing program; yet, they recognize that the pressures that the Board is faced with, that the great majority of the students of patrons who don't receive a busing, the busing program. The, another factor is that as our community has grown and expanded, we now have a highly populated fringe area around the city and that we do not bus, because we just, it just isn't possible under the present situation to provide services for these people because of the numbers it would be to haul, it would require, the number of buses it would re-

quire. And it would be limited payments from the state. There are now no payments from the state for this service. Therefore, we feel that, as a service, some of the responsibility for providing the service should be paid for by the people receiving the service. The patrons in the rural area have come in and supported this concept, the idea that if we have, we're putting some money in it, we're gonna have something to say about it, we're gonna be able to maintain the program. And our patrons from the city are saying, you know, we are very much for this concept because if we have to provide our own services then we feel that the people who are, that the district are providing services for should pay a little bit. You know, it's kind of one of those things where we think this is a middle of the road approach to this thing. It would not be, amount to a hardship, I don't think, on anyone in terms of the cost. If we were to, if we were to charge a fee that would cover all of the local costs for the bus service to the patrons who are riding the buses, it would cost less to give transport to school in our district than it would to participate in the school lunch program. So we are talking about quite a minimum kind of commitment. The average cost per pupil for the pupils we, we are transporting right now, if our total local costs were charged to them, all of it would amount to 24¢ a day. The school district, if, if this bill is passed, does not feel that this would be the way we would go. There would be a partial responsibility for the district and a partial responsibility for the patrons for services.

Chairman: Senator Berube, did you have a question?

Senator Berube: Yes, Mr. Chairman. Not being organized, what do you get from the state now?

Benzie: We get the regular state transportation payments that all districts do—so much a mile and so much (inaudible). This does not cover the total cost of busing.

Senator Berube: Are you, are you busing any, any people further than two miles or beyond, within the boundaries?

Benzie: Oh no, our busing limits right now are set by the district. Four miles to high school and three miles to elementary. We bus outside of that area because of the concentration and the rate the town grows, has grown. Dickinson's located on the west two miles from the, the city limits is two miles from the district boundaries on the west. So our, our growth is north and south and it stretches quite a ways and so . . .

Chairman: Yes, Senator Berube.

Senator Berube: Well, there must be a reason that you're not coming out. The other schools seem to be coming out.

Benzie: We're coming out. The point of the whole thing is that when we look at the expenditure for busing out of the general fund, local expenditure out of the general fund, the question comes up is should we take general fund money that is raised for educational purposes in spending for service purposes. We contend that busing is not an educational function. We contend busing is a service provided for the patrons much like the school lunch program. It is not educational.

Senator Berube: Wouldn't there be a constitutional question here?

Benzie: Of what?

Senator Berube: Charging so much for (inaudible) provides busing.

Benzie: I don't think there would be any constitutional question at all.

Chairman: Yes, Senator Nelson.

Senator Nelson: Mr. Chairman, I think what, what Senator Berube is referring to is, is the, the action by the American Civil Liberties Union against Bismarek on the textbook question, ya know, the free public education and what you are contending is that busing is not a part of that education.

Benzie: That's right. We could, we think this should be very clearly, I think we have to very clearly to designate between educational functions and services, and . . .

Senator Nelson: I think it may be questioned, but I think that you're right, . . .

Benzie: Oh, I'm sure it's questioned.

Senator Nelson: I think it can be, could be very easily differentiated. But what was the 24¢ that you mentioned? That's your average cost out of your general fund . . .

Benzie: Right.

Senator Nelson: . . . over and above the foundation or the . . .

Benzie: The payment from the state.

Senator Nelson: . . . payment from the state.

Benzie: Right.

Senator Nelson: And according to this, you, then the board could charge that 24¢.

Benzie: Or less.

Senator Nelson: Yah, up to the 24¢.

Benzie: Right.

Senator Nelson: Okay. How, how would you go about charging it? What, what I'm thinking is, ya know, we have a hundred and eighty day, a hundred and eighty contact days. You just say that every child is gonna be in school every day and multiply it times a hundred and eighty, or is a parent gonna say, my child was sick for two weeks, why should I pay that 20¢ or \$2.00. I know it doesn't amount to much, but do you anticipate any problem with the administration of this?

Benzie: No. We have been charging a busing fee since 1974.

Senator Nelson: Oh, you have been.

Benzie: Right. By a vote of our rural patrons. Our rural patrons came in and said we want to, we want that, you to charge a busing fee so that we can have door to door service and be guaranteed for door to door, door to door service. I mean, a great deal of controversy in the district at that time was with our urban patrons. Because there was a local bus firm that they were paying to get their kids hauled (inaudible). Our local patrons voted, almost unanimous, our rural patrons for this busing fee, and we set up a committee with the patrons and the whole thing and it was done that way and we just set a graduated scale, so much for the first child, second child, third child,

fourth child, fifth child, and so on. And it's paid one time a year and we've had a hundred percent collections and no problems whatsoever.

Senator Nelson: What is that fee now?

Benzie: That fee is, for one child it's \$4.00 a month, and for two children it's six eighty-nine, for three children it's nine seventy-eight, and up to five or more children, \$15.00 a month. So the average comes out to about a hundred and forty dollars a year.

Chairman: Senator Berube.

Senator Berube: Mr. Chairman. You've been collecting that already?

Benzie: This is correct.

Senator Berube: And nobody refused, too?

Benzie: No, we've had no, we've had a hundred percent collection since 19, it started in 1974.

Senator Berube: Well, why this bill?

Benzie: Because the new bill that relates to the, to the textbook, free textbook situation says that, that unless a fee is specifically so stated in the law, that the fee will not be allowed to be collected. In other words, we feel that with the passage of this, 1057 is it?

Senator Nelson: 1056.

Benzie: 1056?

Senator Nelson: Is that what that says?

Benzie: Yes. If the fee is not stated, exactly stated, specifically stated, written right out, we would not be able to charge the fee. And we feel that if that, with the pass-

age and we feel that it should be passed, that's a good bill.

Senator Nelson: Oh, that's not good at all.

Benzie: Well, I talked to the House on this bill at great length about some of those things there. But ah, . . .

Senator Nelson: Well, we're gonna run into the same thing with shop supplies, with towels, with any type of . . .

Benzie: It says you can, well, it says . . .

Senator Nelson: Yah but it, it only specifies a few of those things.

Benzie: Right. That's correct.

Senator Nelson: It does not go as far as it should if, if that is how it's gonna be interpreted.

Benzie: And we feel that under this situation, there would be no way that we would even attempt to continue this program without specific legislation stating it right out so that we could have . . . We aren't gonna gamble our whole foundation program on, on a small busing fee.

Chairman: Senator Berube?

Senator Nelson: Come back next Tuesday morning and we're gonna hear 1056 here.

Senator Berube: Now, on your voluntary payment, if they refuse to charge, you can't really force them.

Benzie: Well we have never, we've kind of, you know, we've walked up to the line I guess a few times on that but we've never really had to cross over.

Senator Berube: And with this though you would be, you would be forcing.

Benzie: Well, I think we'd have to handle it exactly the same as we do our school lunch program or any other program. If a family is destitute, not able to provide it, those children would be brought to school and nobody would know that they didn't pay the fee. I think if we had somebody out there that was ornery and had, you know, plenty of money to pay the fee, I guess we'd say you can, your children/child's not gonna get on the bus. Ya know, ya gotta have rules and you got to make them stick, ya know.

Senator Berube: Well, these problems come up with textbooks, and when they refuse to pay textbooks there are no real way to collect.

Benzie: No well, . . .

Senator Berube: And that would be the same thing here.

Benzie: I think it's quite different, I think that, I think this is a service, I don't think there's anything educational about riding on a school bus.

Senator Nelson: Well . . .

Benzie: Except what your rear end learns over 12 years, being a rural kid myself.

Chairman: There's a little more pressure involved here, you know, whether you have that ride or not.

Benzie: Well, the thing about it is, ya know, we have 80% of our patrons paying for, ya know, paying 80% of the bill by patrons who are not receiving any of the service. I mean this is an equally questionable kind of situation. It could get us into a whole lot of hot water.

Chairman: Senator Nelson.

Senator Nelson: Well, I don't want to prolong this, Mr. Chairman, but what is your urban policy? You say you have an urban program right now that the parents are paying for?

Benzie: Well, there has been in the past, a private enterprise program within the city. They were paying about \$9.00 a month per child.

Senator Nelson: That's handled directly with the person providing the busing, . . .

Benzie: Right.

Senator Nelson: Not through the school.

Benzie: Not through the school at all.

Senator Nelson: Okay.

Benzie: And we get a lot of discussion on that, too.

Senator Nelson: I'm sure you do.

Benzie: But I would certainly urge you to think favorably about this bill, I think . . .

Chairman: Thank you.

Benzie: . . . it has some precedent setting ideas that might be worthwhile in the future, when you think about energy situation.

Chairman: Thank you. Students, where are you from?

Students: (Inaudible.)

Chairman: Where?

Students: (Inaudible.)

Chairman: Maddock?

Students: Max.

Chairman: Oh, Max. This is the Senate Education Committee, and this morning we've been hearing a bill regarding special payments for bus transportation for some students in the, outside the Dickinson area.

Unknown: (Inaudible.)

Chairman: Okay, we'll close the hearing on, on House Bill 1444.
